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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. GAMMON,
Superintendent,
Moberly Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

JON KEITH SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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2cpp

Question Presented for Review

I.

Does the nonretroactivity principle of *Teague v. Lane* bar the application in a habeas corpus case of a rule that a prosecutor violates a defendant's due process rights when the prosecutor argues a contradictory factual theory of the crime at the later separate trial of a codefendant because this is a new rule of law, and not a new watershed rule of criminal procedure implicit in the concept of ordered liberty without which the accuracy of criminal proceedings would be diminished?

Parties to the Proceeding

All the parties to the proceeding have been listed in the caption. James A. Gammon, the Superintendent of the Moberly Correctional Center is Jon Keith Smith's current custodian. Therefore he is the proper party in a habeas corpus action involving a state criminal sentence that is currently being served. 28 U.S.C. §2254, Rule 2(a). Jeremiah W. (Jay) Nixon is the Attorney General of Missouri and is therefore the proper party in a habeas action involving the future service of a consecutive state criminal sentence. 28 U.S.C. §2254, Rule 2(b).

Michael Groose, who along with Attorney General Nixon, was an appellee in the case below, is no longer a party, because he is no longer the custodian of Jon Keith Smith and should be replaced in the caption of the case by James A. Gammon, who is now acting in the role of custodian of Jon Keith Smith.

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On Petition for Writ of Certiorari to the
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Petitioners, the Superintendent of the Moberly Correctional Center, James A. Gammon, and the Attorney General of Missouri, Jeremiah W. (Jay) Nixon, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court below in Case No. 97-2694 granting a writ of habeas corpus is published as *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). The case was decided on March 7, 2000 and rehearing was denied on June 1, 2000 (Appendix, "App" at 1).

The unpublished order of the United States Court of Appeals for the Eighth Circuit granting a certificate of appealability on November 16, 1998 in *Smith v. Groose*, is reproduced at App. 21.

The unpublished order of the United States District Court for the Western District of Missouri in *Smith v. Groose*, No. 91-0561-CV-W-8-P denying the motion for relief from judgment and the amended motion for relief from judgment on November 26, 1996 is reproduced at App. 24.

The unpublished order of the United States District for the Western District of Missouri in *Smith v. Groose*, No. 91-0561-CV-W-8-P denying the petition for habeas corpus relief on August 4, 1995 following remand from the Eighth Circuit is reproduced at App. 29.

The unpublished January 29, 1993 judgment of the United States Court of Appeals for the Eighth Circuit in *Smith v. Groose*, No. 92-3815 granting rehearing vacating its earlier judgment and remanding the case to the district court for further proceedings is reproduced at App. 32.

The unpublished August 29, 1992 opinion of the United States District Court for the Western District of Missouri denying the petition for habeas corpus in *Smith v. Groose*, No. 91-0561-CV-W-8-P is reproduced at App. 38.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on March 7, 2000 (App. at 2). The petition for rehearing with suggestions for rehearing en banc was denied on June 1, 2000 (App. at 1). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTION PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Specific Facts of the Case

On the night of November 26-27, 1983, Paul and Erline Chambers, an elderly couple were murdered in a home invasion burglary/robbery. The crime involved six total participants: Jon Keith Smith, as well as individuals named Lytle, Bowman, Dixon, Cunningham and Cayson. On December 2, 1983 Lytle gave a statement in which he admitted that all six individuals were participating in the burglary/robbery at the time of the killings and that he witnessed Bowman stab one of the victims. According to this

statement there were initially two groups of burglars who arrived independently at the house but one member of each group was familiar with one member of the other, and they began to work together before the killings.

Lytle testified in the state's case in chief at Jon Keith Smith's March 1987 trial. Lytle, however, testified to a version of events that tended to exculpate himself, Smith, Bowman and Dixon of the murders, blaming these on Cunningham and Cayson. Lytle testified that there were two separate groups of burglars and that Cunningham and Cayson had already committed the murders before the second group arrived independently on the scene, intending to rob the first group, but ultimately agreeing to work together with them.

The trial prosecutor then impeached his own witness, Lytle, with Lytle's December 2, 1983 statement and used this impeachment with the prior inconsistent statement as substantive evidence of Smith's guilt, as was permitted by Missouri evidentiary law. In closing argument the prosecutor emphasized that Lytle's trial testimony should not be believed. He argued that it was implausible that two groups of burglars who happened to know each other would coincidentally target the same house at the same time. He also argued that Lytle's testimony that he and his group searched out and marked unoccupied houses to burglarize was inconsistent with his testimony that the group saw a second group of burglars and intended to rob them. He further argued that it was implausible that a member of the alleged first group of burglars would answer the door when the second group of burglars rang and ask "Can I help you?" when there were already two dead bodies in the house. The prosecutor also argued that Bowman killed the victims to avoid detection. In short at the Smith trial in March 1987, the prosecutor's theory of the case was that Lytle's trial testimony was implausible and all six individuals were

working together at the time of the murders and probably had been doing so throughout the burglary. This theory is consistent with what the prosecutor testified his personal beliefs of what happened were, in a deposition given in connection with the case of another codefendant, Dixon, that is part of the record in this case.

The same prosecutor tried codefendant Cunningham in October 1987. At this trial the prosecutor again called Lytle in his case in chief. Lytle testified essentially as he had at the Smith trial, but the prosecutor did not impeach him with the December 2, 1983 statement. Impeachment was unnecessary to convict Cunningham of murder because the trial testimony and the earlier statement both inculpated Cunningham for felony murder. Cunningham's defense, however, impeached Lytle with the December 2, 1983 statement and argued a theory that there were only five total burglars and that Lytle and the other four had made up Cunningham's participation. The defense also called a police detective who testified that the December 2, 1983 statement by Lytle was not coerced.

The prosecutor objected in Cunningham's trial to defense questions that had as their premise that there were only five burglars and that these five had gotten together and agreed to blame Cunningham who was not involved. He argued that Cunningham was guilty of murder whether or not he actually stabbed the victims. However he also argued that the evidence showed that Cunningham was "the one doing the stabbing" and later argued the following. "He has -- these people are stabbed. This is before Anthony Lytle comes into the picture . . . . Then he talked later about four or five jumping over the fence the next day see, because he knows that after they did this the four or five guys joined the burglary."

In short in Cunningham's trial in which either version of Lytle's story was sufficient to convict and defense counsel argued that Lytle had made up Cunningham's participation, the prosecutor's theory of the case appears to have been consistent with Lytle's testimony and inconsistent with what he argued at the Smith trial. In both cases, Lytle's testimony was essentially identical, and in both cases he was impeached with his December 2, 1983 statement albeit by different parties.

The Eighth Circuit Court of Appeals found a due process violation occurred in Smith's case because of the use of an inconsistent and contradictory theory at the subsequent trial of Cunningham, ordered Smith's murder, armed criminal and robbery convictions overturned and ordered that Lytle's December 2, 1983 statement not be admitted in any retrial of Smith.[1]

Legal Principles Involved

This is a habeas corpus case arising from an application for a writ of habeas corpus from a prisoner in state custody. The district court had jurisdiction to decide the case under 28

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[1]Smith, Bowman, Dixon, Lytle and Cunningham were ultimately convicted of one or more murder charges arising from the crime of November 26-27, 1983. Cayson was never tried, according to the transcript of Lytle's state post-conviction review hearing, because he had already been sentenced to life in prison for an unrelated crime. Lytle succeeded in having all his convictions except one burglary count overturned in a state post-conviction review proceeding. Bowman raised essentially the same theory on which the court below granted relief to Smith unsuccessfully in a habeas corpus petition. *Bowman v. Armontrout*, 859 F.Supp. 369, 380 (W.D. Mo. 1994). The denial of this petition was affirmed by the court below. Bowman did not pursue this issue on appeal. See *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996).

U.S.C. §2254, and the court below had jurisdiction to review the case under 28 U.S.C. §2253.

The issue in this case is whether it is a rule of law and retroactively applicable to cases on habeas corpus review that the due process clause bars a prosecutor from arguing factually contradictory theories of a crime at the separate trials of codefendants. The court below provided two answers to this question each of which merit review by this Court. The court below held that this rule is not new and therefore is retroactively applicable to cases on habeas corpus review. The court below also held that even if this rule is "new" it is the type of watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings that may be created and retroactively applied in a habeas corpus action. The court below's rulings on both these points are in direct conflict with the rulings of the United States Court of Appeals for the Fifth Circuit, and conflict with the principles this Court set out in *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny.[2]

In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), this Court clarified and unified existing precedent on when a new rule of law should be applied to a case on

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[2]The specific ground on which the court below granted relief was not raised in the Missouri courts or a United States district court, making the ground on which relief was granted procedurally barred and an abuse of the writ of habeas corpus. These defenses were raised in the court below. Petitioner now explicitly waives the defenses of procedural bar, abuse of the writ and statute of limitations, in order not to interfere with this Court's review of the question presented for review. See *Goeke v. Branch*, 514 U.S. 115 (1995) (court below grants habeas relief on claim raised for the first time at appellate oral argument and this Court conducts *Teague* review on writ of certiorari).

collateral review and defined what constitutes a new rule of law. This Court stated that "a case announces a new rule of law if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 302 (emphasis in original). This Court then stated that a new rule could be applied to case on collateral review only if it placed primary private individual conduct beyond the reach of the criminal law, or if the new rule was a watershed rule of criminal procedure without which the likelihood of an accurate conviction is seriously diminished. *Id.* at 311-314. This Court opined that "Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Id.* at 313.

In *Butler v. McKellar*, 494 U.S. 407 (1990), a majority of this Court further clarified the principles set forth in *Teague v. Lane*. In *Butler*, this Court held that a rule is "new" even if the decision that creates it is controlled by or within the logical compass of earlier precedents if the result reached was susceptible to debate among reasonable jurists. *Id.* at 416. This Court held that a watershed new rule which may be retroactively to a case on collateral review must be implicit in the concept of ordered liberty and its violation must have seriously diminished the likelihood of an accurate determination in the case. *Id.* at 417.

In *Sawyer v. Smith*, 497 U.S. 227, 235-237 (1990), this Court found that an Eighth Amendment prohibition on prosecutorial comment that misleads a jury about its sentencing responsibility was a new rule of law at the time it was announced. This Court pointed out that if the general principle that capital sentencing should be reliable was held to dictate this rule the test for new rules would be meaningless. *Id.* at 237 (stating "the test would be

meaningless at this level of generality"). Similarly in *Gilmore v. Taylor*, 508 U.S. 334, 344-345 (1993), this Court rejected the proposition that cases establishing a right to present a defense dictated the rule that the state could not give jury instructions that would likely prevent the jury from considering an affirmative defense.[3] These cases hold that general principles about fairness and reliability do not dictate specific rules. In sum, a rule does not cease to be new merely because the court that proclaims it perceives the rule to enhance the fairness of trials or the reliability of sentencing proceedings.

The court below did not cite any holding of this Court or any majority holding of any court that dictates the rule that a prosecutor violates the due process clause by presenting contradictory factual theories of the case at the separate trials of codefendants. The court below relied for direct support for this rule on a single judge concurrence in *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (en banc) (Clark J., specially concurring) and a vacated Ninth Circuit plurality opinion that was issued years after Smith's conviction became final through the completion of direct review, in *Thompson v. Calderone*, 120 F.3d 1045, 1058-1059 (9th Cir. 1997) (en banc) *vacated on other grounds*, 523 U.S. 538 (1998). The Court below nevertheless found that the rule it announced was not new.

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[3]In *Penry v. Lynbaugh*, 492 U.S. 302 (1989), this Court found that a rule, that penalty phase jury instructions preventing jurors from considering mitigating evidence are unconstitutional, was not new. This Court noted that existing precedents of this Court already held that jurors must be allowed to consider mitigating circumstances in the sentencing decision. *Penry* did not involve the kind of general to specific deductive reasoning criticized in *Sawyer* and *Gilmore*.

The Court below defined "a new rule of law" as "one that is not dictated by precedent and if adopted would contravene well established precedents" (App. at 18) (emphasis added). The second prong of this test is absent from this Court's precedents defining a new rule. The court below's unique understanding of what constitutes a new rule and what it takes for a new rule to be dictated by existing precedent has led to a conflict with the decisions of the Fifth Circuit Court of Appeals that have held that a rule, similar to the one the court below has adopted, is a new rule, that may not retroactively be applied in a habeas corpus case. See *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

In the event that the rule it has set out in its opinion is a "new rule", the Court below has determined that it is one of the rare watershed rules of criminal procedure implicit in the concept of ordered liberty without which the accuracy of trials would be diminished, and therefore applicable in a habeas corpus case (App. at 19). This would be the first new rule of its type discovered since this Court defined watershed rules of criminal procedure in 1989 in *Teague v. Lane*.

This holding also places the decision of the court below in conflict with the Fifth Circuit Court of Appeals which has rejected the conclusion that a similar rule would be a watershed rule of criminal procedure that may be retroactively applied in a habeas corpus case. See *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

This holding by the court below is extremely important because it creates a new rule of law that would affect numerous criminal cases involving multiple defendants. The decision narrowly defines what a new rule of law is, in a way that conflicts with this Court's *Teague* jurisprudence, and

threatens to spawn future conflicts between the circuit courts of appeals. The decision also purports to create the first post-*Teague* watershed rule of criminal procedure. Finally, the decision conflicts with Fifth Circuit precedents, analyzing a similar proposed rule.

Summary of Reasons for Granting The Writ

The decision of the court below directly conflicts with the precedent of the Fifth Circuit on the issue of whether a particular rule of law is new. The decision also conflicts with the precedent of the Fifth Circuit on whether this rule is a watershed rule of criminal procedure that is exempt from the ban on the application of new rules in cases on collateral review. Because of this conflict and the broad applicability of the rule enforced, certiorari review is indicated. Additionally the decision of the court below narrowly interprets the concept of a "new rule" and broadly interprets the concept of a "watershed rule" in a way that is inconsistent with this Court's precedents and threatens to create unnecessary conflicts between the circuit courts of appeals in the future. This also indicates that review on certiorari should be granted in this case.

Reason for Granting the Writ

1. **The decision of the Court below conflicts with the decisions of the United States Court of Appeals for the Fifth Circuit on an important issue with broad application to criminal cases throughout the country.**

The court below held that the due process clause requires that a criminal conviction be reversed because at the subsequent trial of a codefendant the prosecutor argued a theory of the facts of the crime that was inconsistent with and

on important points contradicted the theory he argued at the earlier trial. The court below found that this decision did not create a new rule of law and therefore the rule could be applied in a habeas corpus case. The court below also held that even if its decision did create a new rule of law, the rule could be applied in a habeas corpus case because it is the type of watershed rule of criminal procedure that may be retroactively applied to cases on collateral review.

The United States Court of Appeals for the Fifth Circuit has reached opposite conclusions on these points. *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994) is irreconcilable with the opinion of the Court below. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) also cannot be reconciled with the decision of the court below.

In a fact pattern similar to the fact pattern in the case below, Jesse Jacobs made a pretrial videotaped statement to the police admitting to being the triggerman in an abduction and murder committed with an accomplice, Hogan. *Jacobs v. Scott*, 31 F.3d 1319, 1321 (5th Cir. 1993). However, testifying at his own trial Jacobs blamed the killing on Hogan and claimed he was not in the house where the killing occurred when the killing happened. *Id.* at 1321-1322. The prosecutor impeached him with his earlier videotaped statement, argued that Jacobs and Jacobs alone was the killer and presented to the jury as a "special issue" for imposing the death penalty that Jacobs caused the death of the victim and the crime was committed deliberately with the reasonable expectation that her death would result. *Id.* at 1332. The jury found this and another "special issue" and sentenced Jacobs to death. *Id.*

Several months later, at the trial of Hogan, Jacobs also testified that Hogan had done the actual killing. In Hogan's case, the same prosecutor argued that Jacobs had not done the

actual killing, that Jacobs did not know Hogan had a gun and that Jacobs did not in any way anticipate the victim would be shot. *Id.* at 1322-1323. Under Texas law Jacobs was only eligible for the death penalty if he intentionally caused or anticipated the death of the victim. *Id.* at 1324.

Despite the prosecutor's theory of the case at the Hogan trial, the state continued to insist in its subsequent appellate brief in Jacobs' case that Jacobs had been the triggerman and was eligible for the death penalty. *Id.* at 1326. Jacobs filed a habeas corpus petition alleging Eighth and Fourteenth Amendment violations arose from the state's presentation of contradictory theories of the crime in the Jacobs and Hogan cases. *Id.* at 1326. The Fifth Circuit agreed that the theories presented were contradictory but held that to find this violated the constitution would require a new rule of law not dictated by existing precedent which could not be applied in a habeas corpus case. *Id.* at 1326 *citing Teague v. Lane*, 489 U.S. 288, 307 (1989). This decision is in direct conflict with the holding of the Court below.

Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) is also in conflict with the decision below. The United States District Court for the Southern District of Texas granted a writ of habeas to Nichols, based on a theory of estoppel found to be required by the due process clause, because the state in separate proceedings had presented the contradictory theories that both Nichols and his codefendant, Williams, had fired the one single fatal shot into a murder victim, and had obtained death sentences against both. *Id.* at 1264-1265.[4] The Fifth

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[4]Williams was sentenced to death on the theory that he was the person who shot the victim. The penalty phase jury was not instructed on "law of the parties", the Texas concept of accomplice liability. *Nichols v. Scott*, 659 F.3d 1255, 1261 (5th Cir. 1995). At Nichols' first trial the jury at the punishment phase was also not

Circuit relying on *Jacobs v. Scott* held that this was a new rule of law not dictated by precedent that could not be applied in a habeas case. *Id.* 1268-1274. The Fifth Circuit Court of Appeals explicitly held the following:

> In the present circumstances, to hold that the state was constitutionally barred by any form of estoppel--whether under the rubric of collateral estoppel or some variety of judicial or other estoppel --from taking the position in Nichols' case that the shot he fired was the fatal shot because it had previously taken the position in Williams' case, in which Williams received the death sentence, that the fatal shot was the one fired by Williams, would be to apply "a new rule" of constitutional law, "not *dictated* by precedent existing at the time" Nichols' "conviction became final" -- January 9, 1989--contrary to *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989) (original emphasis).

(*Id.* at 1273).

The United States Court of Appeals for the Fifth Circuit also found that the rule Nichols sought was not a watershed rule of criminal procedure that could be retroactively applied in a habeas corpus case because what the prosecutor argued

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instructed on law of the parties and the jury was unable to reach a verdict. *Id.* at 1202. Post-trial jury interviews revealed that "whether or not Nichols was the triggerman had caused problems for the jury in considering the death penalty." *Id.* At a retrial of Nichols, the state "primarily" argued that Nichols was the shooter but argued that even if he was not he should have anticipated the killing and was eligible for the death penalty under the law of the parties. *Id.*

in Williams' case "has nothing to do with the likely accuracy of any determinations made in the subsequent Nichols case." *Id.* at 1273. The Fifth Circuit noted that the *Teague* definition of a new rule could not be overcome merely by invoking longstanding judicial pronouncements that due process concerns itself with fundamental fairness and similar concepts. *Id.* at 1274, *quoting Sawyer v. Smith*, 497 U.S. 227, 237 (1990) (*Teague* "test would be meaningless if applied at this level of generality").

The conflict between the opinion of the court below and the decisions of the Fifth Circuit is real. It implicates an issue that has relevance to every prosecutor in America who may separately try criminal defendants, who have acted jointly in the commission of a crime. Such a prosecutor may be faced with multiple defendants each of whom has given various contradictory accounts of the facts of the crime. The decision of the court below sets out a new constitutional rule on how the prosecutor must argue the theory of what happened in these separate trials. This is an important case with broad application on which certiorari should be granted.

2. **The opinion of the Court below explicitly misinterprets and misapplies this Court's *Teague v. Lane* jurisprudence concerning the definition of a new rule of law. This has the potential of becoming an engine that will generate multiple unnecessary conflicts between the circuit courts of appeals, just as in this case it generated a conflict with the Fifth Circuit.**

In rejecting the idea that the rule it proclaimed in this case was a new rule of law, the court below articulated a two-pronged test: "Under *Teague* a new rule is one that is not dictated by precedent and, if adopted, would contravene well-established precedents" App. at 16. The second prong of this

test is contrary to the decisions of this Court.[5] In *Butler v. McKellar*, 494 U.S. 407, 410-411 (1990), this Court affirmed the holding of *Teague* that a rule is new if it is not dictated by existing precedent. This Court noted that the new rule principle vindicates good faith interpretations of existing precedent by state courts and analyzed whether the outcome sought was susceptible to debate among reasonable jurists to determine whether the creation of new rule was required to grant relief.

Neither *Butler v. McKellar* nor *Saffle v. Parks* nor any other precedent of this Court endorses the two-pronged test adopted by the Court below. The two-pronged test in fact contradicts *Butler v. McKellar* by narrowing the definition of a new rule to exclude a category of rules not dictated by existing precedent. This test is a formula for the creation of error and repeated conflicts with the other circuit courts of appeals that hold to this Court's reasoning and the test set out in *Butler v. McKellar*.

The Court below also was unable to cite to any majority holding of any court that promulgated or enforced a rule identical to or even similar to the rule created and enforced in this case. Nevertheless the court below found that the rule it enforced was dictated by existing precedent. The court below relied largely on the general principles that trials should be fair and prosecutors should be interested in justice rather than convictions, and reasoned that these general principles dictated that presenting contradictory theories of a crime at separate trials necessarily violates the due process

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[5]The opinion below cites to the syllabus of this Court's decision in *Saffle v. Parks* as support for this two pronged test App. at 16, *citing* 494 U.S. 484, 486 (1990). This syllabus is neither part of the opinion, nor can it be fairly read to support the proposition for which the court below cited it.

clause (App. at 8-9, 17).

This type of reasoning was rejected by this Court in *Sawyer v. Smith*, 497 U.S. 227, 237 (1999). In *Sawyer v. Smith*, this Court found that the principle that capital sentencing should be reliable did not dictate the specific rule that a prosecutor may not constitutionally mislead the jury about its responsibility for sentencing. *Id.* This Court found that applying the test for a new rule at this level of generality would make the test meaningless. This Court made the same point again in *Gilmore v. Taylor*, 508 U.S. 334, 344-345 (1993). In that case this Court rejected the idea that the right to present a defense dictated a rule that a state could not give jury instructions that prevented the jury from considering an affirmative defense presented at trial. *Id.* This Court again held that at this level of generality *Teague* analysis would provide no meaningful guidance as to what a new rule is. *Id.*

The court below found a rule that has apparently never been previously discovered or enforced by a majority of any appellate court in the history of the Republic to be dictated by existing precedent. In so doing the court engaged in a type of analysis repeatedly rejected by this Court, and presumably avoided by lower courts that follow this Court's precedents. The court below also created its own definition of a "new" rule of law that on its face contradicts the definition set out by this Court. These holdings promise future unnecessary conflicts between the court below and other circuit courts of appeals.

3. **The discovery by the court below of a purported watershed rule of criminal procedure necessary to fundamental standards of fairness and accuracy in criminal law presents a significant issue. This creates the potential for further conflicts with other circuit courts of appeals should the court below discover other watershed**

rules of criminal procedure based on similar reasoning.

This Court has recognized that certain watershed rules of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding may be retroactively applied in a habeas corpus case. *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This Court has indicated that the right to counsel in serious criminal proceedings is such a rule. *Id.* This Court has also noted that to be a watershed rule of this type the rule must fall into the small core of rules requiring the observance of procedures that are implicit in the concept of ordered liberty. *Gilmore v. Taylor*, 508 U.S. 333, 346 (1993). Additionally, such a new rule must involve a new procedure without which the likelihood of an accurate conviction is seriously diminished. *Butler v. McKellar*, 494 U.S. 407, 417 (1990). This Court found in *Teague* that it is unlikely that many such basic components of due process have yet to emerge. *Teague v. Lane*, 489 U.S. 288, 314 (1989) (plurality opinion).

The rule created by the court below is not implicit in the concept of ordered liberty and it does not enhance the likely accuracy of Smith's conviction. That the prosecutor presented a contradictory theory at Cunningham's trial has nothing to do with the accuracy of Smith's trial. There is no finding that the theory presented at Smith's trial was false or that the prosecutor did not himself believe the theory he presented in Smith's case. The record supports the conclusion that he did.

The court below's recognition of a "watershed rule", that does not have the qualities this Court has held to be necessary to a watershed rule, has created a conflict with the Fifth Circuit in the case of the specific rule found by the court below. The reasoning behind the recognition of this "watershed rule" also creates the potential for future

unnecessary conflicts with other circuit courts of appeals that have followed this Court's jurisprudence on the nature of a watershed rule of criminal procedure.

Conclusion

Superintendent Gammon and Attorney General Nixon pray that this Court issue a writ of certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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FILED

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No. ——— OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. GAMMON,
Superintendent,
Moberly Correctional Center, and

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

JON KEITH SMITH,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

APPENDIX TO PETITION

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2694WMKC

Jon Keith Smith,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
	*	
Michael Groose,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge Bowman would grant the petition. The petition for rehearing by the panel is also denied (5128-010199).

June 1, 2000

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2694

Jon Keith Smith,	*
	*
Appellant,	*
	* Appeal from the United States
vs.	* District Court for the
	* Western District of Missouri
	*
Michael Groose;	*
Missouri Attorney General,	*
	*
Appellees.	*

Submitted: May 13, 1999

Filed: March 7, 2000

Before WOLLMAN, Chief Judge, FLOYD R. GIBSON, and BEAM, Circuit Judges.

WOLLMAN, Chief Judge.

Jon Keith Smith was convicted of first-degree felony murder,[1] armed criminal action, robbery, and burglary in Missouri state court and was sentenced to five terms of life imprisonment. He appeals from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Although we do not lightly overturn this thirteen-year-old state conviction, we conclude that we are compelled to do so. We reverse and remand the case with directions to issue an appropriate writ because the State's use of inconsistent prosecutorial theories violated Smith's due process rights in a way that rendered his convictions fundamentally unfair.

I.

On the morning of November 27, 1983, Police Officer James Hughes discovered the dead bodies of Pauline and Earl Chambers in their home in Kansas City, Missouri. A butcher knife found on a bed near the bodies was determined to be the murder weapon.

During the evening of November 26, 1983, Smith, James Bowman, Anthony Lytle, and Donald Dixon, all then juveniles, set out to find a house to burglarize. Testifying for the State at Smith's trial, held in March 1987, Lytle stated that the group began to knock on the front doors of neighborhood homes. If someone answered, the group asked if there was a party inside. At those houses where no one responded, the teenagers unscrewed the porch light bulbs, intending to return later to complete a burglary. When the group approached the Chamberses' house they noticed that the storm door had been broken and saw a footprint on the front door, which was ajar. Although Smith believed that the

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[1]The statute in effect was Missouri Revised Statutes section 565.003 (1978), which has since been repealed. Felony murder is now a type of second-degree murder. See Mo. Rev. Stat. § 565.021 (West 1999).

house belonged to an elderly white couple who were rarely home, Lytle observed a black man through the window. The group concluded that someone else was in the process of burglarizing the house and decided to "rob the burglars."

Smith and Bowman departed to obtain Bowman's car, which they had left down the street at Smith's house, while Lytle and Dixon watched the house from the bushes. The car contained Bowman's shotgun, which the group intended to use to threaten the burglars. When an individual left the house carrying a television, Dixon recognized him as Michael Cunningham. Dixon spoke with Cunningham, who agreed to allow the Dixon-Lytle group to enter the house and steal what remained of the property. When Smith and Bowman returned in the car, Dixon explained that they now had "permission" to enter the house, and the four entered with Cunningham.

Lytle stood guard at the front door while Smith, Bowman, and Dixon searched the house for property worthy of theft. Smith ran to the kitchen, saying "oh, oh, a microwave!" and Bowman to an empty front bedroom. Shortly thereafter, Smith and Bowman left the house together, Smith carrying a microwave and Bowman carrying a television. From this point, Lytle's accounts of the incident vary.

According to Lytle's testimony at trial, after Smith and Bowman departed Lytle ran to the back of the house to find Dixon. On the way, Lytle saw a body lying in a doorway and asked Cunningham, "What did you do to this guy?" Cunningham responded, "Don't worry about it. We took care of it." Lytle then "started hollering about 'We got to go now because he did something to this guy,'" to Dixon, who grabbed a television and then fled the scene with Lytle, joining Smith and Bowman and driving away from the

premises. This version of the events is consistent with a statement Lytle made to police on November 30, 1983.

On December 2, 1983, however, Lytle told police a different version of the events, one which he later recanted. Lytle stated that his group was inside the house before the Chamberses were murdered. He said that he heard the Chamberses talking to one of the burglars and that a scuffle ensued. He heard Mr. Chambers say, "no, no, no" and then heard "sounds of pain." Lytle said that he went to see what was happening and observed Bowman, who had returned to the house, kneeling over Mr. Chambers and stabbing him with a pocket knife. He said that Bowman had blood "all over his jacket." Cunningham and another adult, identified as Rodney Cayson, were also in the back bedroom.

At Smith's trial, the State used Lytle's December 2, 1983, statement to impeach his in-court testimony and as substantive evidence of Smith's guilt by relying upon section 491.074 of the Missouri Revised Statutes, which was enacted after the Chamberses had been killed and which authorizes the use of prior inconsistent statements as substantive evidence. See *State v. Bowman*, 741 S.W.2d 10, 12-13 (Mo. 1987) (en banc). The State accordingly argued that Bowman was the killer and that Smith was therefore guilty of felony murder, armed criminal action, and robbery because the murder occurred while he was in the house committing the burglary.[2] The jury agreed and convicted Smith of two

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[2]The State also relied on Lytle's statement incriminating Bowman to convict Bowman of one count each of first-degree felony murder, armed criminal action, stealing without consent, and second-degree burglary. See *State v. Bowman*, 741 S.W.2d 10, 11 (Mo. 1987) (en banc). Bowman was acquitted on one felony murder charge. See id. at 12. We affirmed the district court's denial of Bowman's claim for habeas relief. See *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996).

counts of first-degree felony murder, two counts of armed criminal action, one count of first-degree robbery, and one count of second-degree burglary. The court sentenced Smith to five life sentences, four to run concurrently, one consecutively. The jury's recommendation of a seven-year sentence for the burglary offense was not imposed because the court found that it would constitute double jeopardy to sentence Smith on that conviction.

In April of 1987, after Smith's trial and conviction, the State indicted Cunningham for the murders. At Cunningham's trial, the State relied on testimony from Lytle, consistent with his November 30, 1983 statement and his testimony at Smith's trial, that the Chamberses were already dead when he and his companions arrived. The December 2, 1983 statement was mentioned but not admitted. The jury convicted Cunningham of two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of second-degree burglary. His convictions were affirmed in *State v. Cunningham*, 763 S.W.2d 186 (Mo. Ct. App. 1988).

Smith's appeal from his conviction included a claim challenging the sufficiency of the evidence based on Lytle's recanted statement. The Missouri Court of Appeals affirmed Smith's convictions and sentence in an unpublished opinion on May 3, 1988. An application to transfer to the Missouri Supreme Court was denied on September 13, 1988. Smith filed a federal habeas petition in June 1991, again including

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Dixon was convicted of similar charges at approximately the same time as Lytle, before the effective date of section 491.074. Lytle's statements, however, were not used as evidence at his trial; Dixon incriminated himself in a letter asking Lytle to say that he had worn the shoes that made a shoeprint at the residence. See *State v. Dixon*, 716 S.W.2d 815 (Mo. Ct. App. 1986).

a claim about the insufficiency of the evidence based on Lytle's statement. The federal district court denied both the petition and Smith's application for a certificate of probable cause. It denied the sufficiency of the evidence claim on the merits. On January 29, 1993, we remanded the case for further proceedings based on a claim of newly discovered evidence. On August 4, 1995, the district court again denied the petition, and on November 16, 1998, we granted Smith a certificate of appealability on his claim of insufficient evidence regarding the following question: "Does the fact that the State secured Appellant's murder conviction on the basis of testimony from Anthony Lytle that was inconsistent with, if not diametrically opposed to, the testimony that Lytle subsequently gave at Michael Cunningham's trial . . . render Appellant's murder conviction void for want of due process?"

We answer the question in the affirmative.

II.

Because Smith's petition for habeas corpus was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (AEDPA), we apply the pre-AEDPA standard of review to his claim. See *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997); *Pruett v. Norris*, 153 F.3d 579, 584 n.6 (8th Cir. 1998). Federal habeas review of an alleged due process violation stemming from a state court conviction is narrow. See *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986); *Anderson v. Goeke*, 44 F.3d 675, 679 (8th Cir. 1995). To obtain habeas relief on a due process claim, the petitioner must show that the impropriety was so egregious that it "fatally infected the proceedings and rendered [the] entire trial fundamentally unfair." *Young v. Bowersox*, 161 F.3d 1159, 1161 (8th Cir. 1998) (quoting *Moore v. Wyrick*, 760 F.2d 884, 886 (8th Cir. 1985)). Under this standard, the petitioner

must demonstrate a "reasonable probability that the error complained of affected the outcome of the trial," meaning that the verdict probably would have been different absent the alleged impropriety. *Hamilton v. Nix*, 809 F.2d 463, 470 (8th Cir. 1987) (en banc).

III.
A.

The question before us is whether the Due Process Clause forbids a state from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event.

We begin with the government's fundamental interest in criminal prosecution: "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); see *United States v. Agurs*, 427 U.S. 97, 111 (1976). Although the prosecutor must prosecute with earnestness and vigor and "may strike hard blows, he is not at liberty to strike foul ones." See id. The government's role therefore is unique in the justice system, and with it come certain mandates as well as privileges. Consistent with this "quasi-judicial" role, see e.g., *State v. Ross*, 829 S.W.2d 948, 951 (Mo. 1992) (en banc), the Due Process Clause requires conduct of a prosecutor that it does not require of other participants in the criminal justice system, such as the duty to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. . . ." *United States v. Bagley*, 473 U.S. 667, 675 (1985). The due process requirement will cast into doubt a conviction obtained by a prosecutor's knowing or reckless use of false testimony. *Napue v. Illinois*, 360 U.S. 264, 269, 272 (1959); *United States v. Duke*, 50 F.3d 571, 577-78 & n.4 (8th Cir. 1995) (government has duty to serve and facilitate the truth-finding

function of the courts). On the other hand, the government also benefits from its peculiar position. For example, the government is permitted to offer leniency to witnesses in return for testimony. See *United States v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999).

Two courts of appeals have recognized that inconsistent prosecutorial theories can, in certain circumstances, violate due process rights. In *Thompson v. Calderon*, a plurality of the Ninth Circuit held that the state of California violated a defendant's due process rights by arguing at Thompson's trial that he alone committed a murder, while arguing at a subsequent trial that another defendant actually committed the same murder. 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538 (1998). After noting the fundamental duty of prosecutors "to vindicate the truth and to administer justice," the court pointed out that the prosecutor in the second trial "returned to his original theory and discredited the very evidence he had previously offered in Thompson's trial." Id. The prosecutor had argued different motives, different theories, and different facts for each defendant and had secured convictions at both trials. Id. at 1059.

In *Drake v. Francis*, the Eleventh Circuit evaluated two prosecution arguments for two defendants convicted of the same murder. The court found that the two theories were "fairly consistent" because both prosecutors had argued that both defendants played a role in the murder; because their arguments varied only with regard to the extent of involvement, no due process violation had occurred. 727 F.2d 990, 994 (11th Cir. 1984). On rehearing en banc, the majority declined to reach the issue, granting relief on other grounds. *Drake v. Kemp*, 762 F.2d 1449, 1451, 1461 (11th Cir. 1985) (en banc). In his special concurrence, Judge Clark addressed the due process issue. After exhaustively recounting

the evidence regarding what he concluded were totally inconsistent theories of the same crime, he concluded that "[t]he state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." Id. at 1479 (Clark, J., specially concurring).

The Fifth Circuit has also discussed the problem of seemingly inconsistent prosecutorial arguments for different defendants at different trials, but in the context of estoppel, both collateral and judicial. See *Nichols v. Scott*, 69 F.3d 1255, 1268-72 (5th Cir. 1995). The court found that a guilty plea by one co-defendant did not estop the government from seeking a murder conviction through trial of the other, particularly given that the evidence showed that both men were present and had participated in the robbery and the shooting at the victim, thus rendering both liable to a conviction of felony murder, even though it could not be determined whose gun caused the fatal wound. See id. at 1270-71. The court found that the arguments were not factually inconsistent. See id. at 1269.

In the present case, the prosecutor who handled Smith's case also handled Cunningham's and, we note, the cases against all the other defendants. When trying Smith, the State asserted that Lytle's December 2, 1983 statement was the truth, that Lytle had made up his in-court testimony to try to avoid his and his associates' convictions for felony murder, and that Bowman had killed the Chamberses after Smith's group entered the house. See e.g., Tr. on Appeal, Vol. II at 597 ([Prosecutor:] "So that's why the Chambers were killed. Mentality of Bowman: avoid detection."). Subsequently, when trying Cunningham, the State contended that Lytle's November 30, 1983 statement was the truth, did not introduce the videotaped December 2, 1983, statement, and objected to a line of questioning by defense counsel

based on the theory that Lytle was lying about Cunningham's complicity in order to protect his friends.

In short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa. The State points out in its brief that "[t]here is no question that the victims were killed during the burglary either before or after the petitioner began to participate." This is precisely the point--the State argued in one case, "before," and in another case, "after," in its successful attempt to prove beyond a reasonable doubt that the Chamberses were murdered at two different times. The state court formulated jury instructions that attempted to account for this difference in timing and the conclusions which flow from it. See Legal File, jury instr. 7.[3] This before/after distinction is the heart of the prosecutorial inconsistency that allowed the State to convict as many defendants as possible in a series of cases in which the question of timing was crucial. See *State v. Bowman*, 741 S.W.2d 10, 12 (Mo. 1987) (en banc) (Lytle's December 2, 1983 statement may "provide the only firm indication" the Chamberses were assaulted after Lytle's group arrived). In contrast to the situation in *Nichols*, the State's argument here is not factually consistent, nor could Smith have been convicted of felony murder under both theories. We note that the State's prosecutor's office itself recognized the importance of the timing to the juveniles' convictions for the murders when it consented to the vacation of Lytle's convictions in a

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[3]The jury, however, may have remained somewhat confused by the instructions. See Tr. on Appeal, Vol. II at 639-40 (court requiring that jury re-read instructions and redetermine verdicts because of first erroneous verdicts). Indeed, despite the conscientious efforts of the attorneys and the court, jury instructions 6 and 7 are contradictory on this crucial aspect of timing, making it difficult to conclusively determine what the jury found regarding Smith's guilt. On this point, however, we defer to the Missouri courts' interpretation of the instructions, as described in Part B.

time-barred state post-conviction motion hearing that resulted in Lytle's release. See Tr. 29.15 Mot., *Lytle v. State*, at 9 (January 11, 1990) (State stipulated that Lytle's counsel was ineffective for failing to object to jury instructions because "according to Anthony Lytle's testimony, the people were dead, and yet according to the argument used by [the prosecutor] under the cases, it doesn't matter.").

A similar but more common situation is that in which a prosecution witness proffers testimony that is inconsistent with his previous testimony elsewhere. In *United States v. Albanese* the defendant claimed that the prosecutor's reliance on one witness's inconsistent testimony constituted misconduct that resulted in a hung jury, thereby precluding any additional prosecution under the Double Jeopardy Clause. 195 F.3d 389, 390 (8th Cir. 1999). In affirming the district court, we held that the prosecutor's seemingly inadvertent use of inconsistent testimony, particularly when coupled with the reopening of the witness's cross-examination, did not rise to the level of misconduct that would bar a retrial. See id. at 393-94. In Smith's case, in contrast, we need not speculate on jury deliberations or prosecutorial intent, or discuss whether Lytle's inconsistent statements should have been presented to the jury. Here, the witness did not change his story at trial. Rather, the prosecutor chose at Smith's trial to use Lytle's December 2, 1983 statement to secure Smith's conviction and then later, at Cunningham's trial, elected to use Lytle's November 30, 1983 statement to secure Cunningham's conviction. Lytle's testimony constituted the only evidence of when the murders occurred and was the sole basis for two different convictions on two contradictory theories. In *Albanese*, in contrast, identity was established, and the inconsistency related solely to the defendant's level of involvement in a conspiracy to rob and murder a drug dealer. See id. at 391. During Albanese's trials, the inconsistency in the testimony was presented to the jury, id.

at 394; in Smith's trial, no such inconsistency could be shown because Cunningham's trial had not yet occurred.

Smith contends that this manipulation of the evidence deprived him of due process and rendered his trial fundamentally unfair. We agree. The State's use of factually contradictory theories in this case constituted "foul blows," error that fatally infected Smith's conviction. Even if our adversary system is "in many ways, a gamble," *Payne v. United States*, 78 F.3d 343, 345 (8th Cir. 1996), that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.

Suppose, for example, that the prosecutor had argued a murder theory based on Lytle's December 2, 1983 statement to convict Smith in Courtroom A in the morning, then walked upstairs to Courtroom B and argued a contradictory murder theory based on Lytle's November 30, 1983, statement to convict Cunningham in the afternoon? Again, suppose that Smith and Cunningham had been tried jointly. Would the prosecutor have been entitled to ask the jury to accept as true both of Lytle's accounts of who had murdered the Chamberses in an attempt to secure convictions of both Smith and Cunningham?

We do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violates the principles of due process. For example, the passage of time between trials, such as the four months' time between Smith's trial and Cunningham's, may be a legitimate excuse for minor variations in testimony or defects in memory, as seems to

have occurred in *Albanese*. See 195 F.3d at 393. In Smith's case, however, the relevant variation was neither minor nor found in the testimony at trial.

Smith's situation is unusual, and we doubt that claims such as his will often occur. To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime. In the present case, the State's zeal to obtain multiple murder convictions on diametrically opposed testimony renders Smith's convictions infirm. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

B.

To obtain habeas relief under the Due Process Clause, Smith must demonstrate that the State's error rendered unreliable his convictions involving the violence done to the Chamberses. We find that Smith has succeeded in doing so. We note that Smith has not contested the burglary conviction. Moreover, we do not find the burglary conviction to be undermined, given that the inconsistency centers on the charges arising from the Chamberses' deaths, not on the charge for Smith's theft of property from the home.

In its unpublished memorandum decision affirming Smith's conviction, the Missouri Court of Appeals discussed with approval the jury instruction given at Smith's trial, stating that if the jury found that Cunningham or Cayson killed the Chamberses, the "jury would have to find appellant [Smith] not guilty." Thus, the jury would have had to find that someone other than Cunningham or Cayson was the murderer in order to convict Smith.

Absent the State's argument that Lytle's December 2, 1983 statement incriminating Bowman was the truth,--i.e. had the State presented Lytle's testimony as it did during Cunningham's trial--the State had no evidence to prove that Bowman was the killer and that Smith was thus guilty of felony murder, armed criminal action, and first-degree robbery. Bowman's shoes did not match the bloody footprints in the room. Bowman's prints were not found on the butcher knife determined to be the murder weapon. No blood was found on Bowman's clothes. Aside from Lytle's testimony, the State's trongest evidence against Smith consisted of a palm print on a stolen television found at his residence and a shoeprint from the residence which matched that of Donald Dixon's shoes. The State presented evidence that the Chamberses were murdered, but on the key question of the time at which the murders were committed, the State's evidence--Lytle's testimony--was offered to prove two different versions, which the State then used in different, inconsistent ways during the trials.

Therefore, absent the State's actions, the outcome of the trial probably would have been different; Smith likely would not have been convicted of murder, armed criminal actoin, and robbery. As the State asserts, either Smith arrived before the murder or he arrived after; once the State's use of inherently contradictory theories is removed, the remaining evidence submitted during his trial points to "after." Accordingly, Smith's convictions for murder, armed criminal action, and robbery must be vacated.

The State argues that Smith could have been convicted for felony murder under the theory the prosecution put forth

at Cunningham's trial.[4] This assertion is misdirected. The State proved its case against Smith under the Bowman-as-murderer theory, and speculation regarding what the jury might have done under different circumstances is not a basis upon which to dispense with the State's due process duty of fair prosecution. Our analysis involves the fairness and outcome of the trial at issue, Smith's trial. Assuming, arguendo, however, that the State's argument is relevant, given the evidence in the case we find it unlikely that a jury would have convicted Smith under the State's theory presented at Cunningham's trial, which established through Lytle's in-court testimony that Cunningham and Cayson were responsible for the Chamberses' deaths before Cunningham re-entered the house with Lytle, Smith, Bowman, and Dixon, and that Cunningham then told Lytle not to worry because they had "taken care of" the Chamberses. The State itself had originally dismissed the charges against Smith for insufficient evidence for the crimes of violence. See Dep. of Prosecutor

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[4]We briefly address the State's arguments concerning our decision in a companion case, *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996). The State points out that we denied habeas relief to Bowman and noted that a jury could have believed Lytle's December 2, 1983 confession, which was admitted during Bowman's trial much as it was in Smith's. see id. at 1346. In Bowman's case, however, we were presented with a procedurally barred claim requiring Bowman to meet the actual innocence standard, which subjects a petitioner to a heavier burden of proof than does Smith's preserved due process claim. See id. (discussing actual innocence standard; second prong requires petitioner show "more likely than not no reasonable juror would have convicted him"). That Bowman did not conclusively show he was actually innocent--that he was not present at the time of the murders--does not mean that Smith cannot succeed on a preserved claim of constitutional error that undermines our confidence in the outcome. Moreover, in Bowman's case we were not presented with the issue of the State's use of diametrically opposed theories of guilt.

at 3-4. We conclude that it is unlikely that the jury could have found beyond a reasonable doubt that Smith was guilty of felony murder if it had been presented with the State's Cunningham-trial theory that the Chamberses had been killed prior to the entry into the home by Smith and his cohorts.

IV.

The State argues that a holding that the State's use of factually contradictory theories violates due process constitutes a new rule of law that may not be applied retroactively to Smith under *Teague v. Lane*, 489 U.S. 288 (1989). "The nonretroactivity principle [in *Teague*] prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (emphasis in original). Under *Teague*, a new rule is one that is not dictated by precedent and, if adopted, would contravene well established precedents. See *Saffle v. Parks*, 494 U.S. 484, 486 (1990).

Our holding in this case is a decision dictated by precedent, for we do not break new ground nor impose a new obligation on the government. Neither the due process requirement that the government prosecute fairly in a search for truth nor the prosecutor's role in such a prosecution constitutes a new rule of law. The prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger*, 295 U.S. at 88. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." See id. The prosecutor's role is to protect those innocent of crimes and to uphold the constitutional rights of the accused--to seek justice and fairness, not solely convictions. See id.; *Bagley*, 472 U.S. at 667. Those lawyers who act on behalf of the government in criminal cases "serve truth and justice first." *Thompson*, 120 F.3d at 1058 (discussing due process case law, ethics rules, and the prosecutor's role). State courts, presented with a factual contradiction in successive

prosecutions as occurred in this case, would have been compelled to hold as we have.

Even if our holding were to constitute a new rule of law, however, it would fall within the narrow ***Teague*** exception for cases that establish rules necessary to fundamental standards of fairness and accuracy in the criminal law. See *Teague*, 489 U.S. at 312; *Parks*, 494 U.S. at 495; see also *Butler v. McKellar*, 494 U.S. 407, 416 (1990) (holding *Teague's* fundamental fairness exception inapplicable to a rule that does not promote the accuracy of convictions). Our holding that the Due Process Clause's guarantee of fundamental fairness prohibits prosecutors from putting forth inherently factually contradictory theories to convict multiple defendants of the same murder embodies the elements of primacy and centrality that indicate a "watershed rule of criminal procedure." *Parks*, 494 U.S. at 495. "That requirement [of due process in a criminal trial], in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

V.

The judgment is reversed, and the case is remanded to the district court with directions to issue an appropriate writ of habesa corpus vacating Smith's murder, armed criminal action, and robbery convictions. We have a duty to "dispose of the case summarily, as law and justice require." See 28 U.S.C. §2243 (1999); *Peyton v. Rowe*, 391 U.S. 54, 66 (1968). Although we have the "authority to preclude a state from retrying a successful habeas petitioner," that retrial bar is an "extraordinary remedy" suitable only in certain circusmtances. See *Foster v. Lockhart*, 9 F.3d 722, 727 (8th

Cir. 1993). Because the evidence and the theory of guilt advanced at his trial may have been sufficient to convict Smith, under *Lockhart v. Nelson* the State is entitled to retry him. See 488 U.S. 33, 40, 42 (1988). We thus direct the district court to enter an order granting Smith release from custody unless within a reasonable time the State affords him a retrial on the vacated charges, at which the State will be precluded from relying upon Lytle's December 2, 1983, statement as evidence of Smith's guilt.

We express our appreciation to appointed counsel for her zealous efforts on Smith's behalf.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

97-2694

Jon Keith Smith,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the
vs.	*	Western District of Missouri
	*	
Michael Groose, et al.,	*	
	*	
Appellee.	*	

Appellant's application for a certificate of appealability is granted, limited to the issue of the sufficiency of the evidence to support the convictions. In briefing this issue, the parties are asked to address the following question: Does the fact that the State secured Appellant's murder conviction on the basis of testimony from Anthony Lytle that was inconsistent with, if not diametrically opposed to, the testimony that Lytle subsequently gave at Michael Cunningham's trial (see Appellant's Reply to Response to Application for Certificate of Appealability at 10-11) render Appellant's murder conviction void for want of due process?

November 16, 1998

Order entered at the direction of the Court:
MICHAEL GAS eeb
Clerk, U.S. Court of Appeals, Eighth Circuit

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Filed April 14, 1997)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0561-CV-W-8-P
	)	
JAMES GAMMON,	)	
	)	
Respondent.	)	

ORDER

On August 4, 1995, the Court denied petitioner's application for writ of habeas corpus and on September 18, 1995, this Court denied petitioner's motion to alter and amend the judgment. On September 19, 1995, judgment was entered pursuant to those orders. On October 17, 1995, petitioner filed a motion for issuance of probable cause, and on December 12, 1995, a motion for relief from judgment. On November 26, 1996, those motions were denied. Now before the Court is petitioner's December 30, 1996, "Notice of Appeal and Request for Certificate of Appealability."

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or

issues satisfy the showing required 28 U.S.C. § 2253(c) (2) and (3).

Because this case presents issues which are not deserving of appellate review under the above standards, it is

ORDERED that petitioner's Request for Certificate of Appealability is DENIED.

/s/ JOSEPH E. STEVENS, JR
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

Dated: April 14, 1997

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Filed Nov. 26, 1996)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0561-CV-W-8
	)	
MICHAEL GROOSE,	)	
	)	
Respondent.	)	

ORDER

Before the Court are (1) petitioner's October 17, 1995, Motion for Issuance of Certificate of Probable Cause (doc. #44), (2) December 12, 1995, Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b) (doc. #46),[1] (3) petitioner's *pro se* October 15, 1996, "Affidavit to Dismiss the First 60b Supplement Motion" (doc. #50) and "Supplement to Rule 60b Motion" (doc. #49), and (4) *pro se* "Renewed Motion for Reappointment of Counsel" (doc. #51). Petitioner's Motion for Issuance of Certificate of Probable Cause seeks relief from this Court's August 4, 1995 Order denying his petition for writ of habeas corpus. However, petitioner admits that this motion was not served in a timely manner in accordance with the Federal Rules of Civil Procedure. He has, therefore, filed subsequent motions for equitable relief under Rule 60(b), asserting that financial difficulties precluded petitioner's compliance with the rules and that the grounds underlying his original petition merit

[1]Petitioner's first two motions were filed on his behalf by his attorney.

further review. Petitioner further asserts that the grounds raised by Smith in this case are identical to those raised by his codefendant James Bowman and should be preserved to prevent a ruling inconsistent with that in *Bowman v. Gammon*, a companion case then pending appeal before the Eighth Circuit.

Because this Court finds that the arguments advanced by petitioner do not merit legal or equitable relief from this Court's earlier judgment under either Fed.R.Civ.P. 59(e) or 60(b), his motions must be denied.[2] Accordingly, it is

ORDERED that petitioner's October 17, 1995, Motion for Issuance of Certificate of Probable Cause (doc. #44) is denied. It is further

ORDERED that petitioner's October 23, 1995, Motion for Relief from Judgment (doc. #46) is denied. It is further

ORDERED that petitioner's October 15, 1996 "Affidavit to Dismiss the First 60b Supplement Motion," (doc. #50) and "Supplement" (doc. #49), which we construe together as an "Amended Motion for Relief from Judgment pursuant to Rule 60(b)," are denied. It is further

---

[2]We note that the "identical issues" have now been decided by the Eighth Circuit, thus precluding any likelihood of relief on the merits. See *Bowman v. Gammon*, 85 F.3d 1339 (8th Cir. 1996); *Bowman v. Armontrout*, 859 F.Supp. 369 (W.D. Mo. 1994). As the Eighth Circuit concluded in affirming this Court's order in *Bowman*, "Under Missouri law, [petitioner's] conviction for felony murder [in the first degree] will stand if he participated in the burglary where the murders occurred." *Bowman v. Gammon*, 85 F.3d at 1346. See Mo.Rev.Stat. § 565.021. It is apparent that the jury in Smith's case could and did reasonably believe that Smith, who was found in possession of property stolen from the Chamber's home and who had blood on his shoes, was involved in the burglary, and further found that the Chamber's murders occurred in the course of the burglary by one of the burglars.

ORDERED that petitioner's Renewed Motion for Reappointment of Counsel (doc. #51) is denied as MOOT. It is further

ORDERED that the Clerk of the Court send a copy of this ORDER by certified mail, return receipt requested, to petitioner Jon Keith Smith and to attorney, Ron Baugh.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
United States District Court

Dated: November 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Filed Sept. 18, 1995)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0561-CV-W-8
	)	
MICHAEL GROOSE, et al,	)	
	)	
Respondents.	)	

ORDER

This habeas corpus action is before the Court on petitioner Jon Keith Smith's motions to take judicial notice and to alter or amend the Court's August 4, 1995 judgment.

In his motion to take judicial notice, petitioner asks the Court to consider trial transcripts, deposition testimony, and other materials contained in three black binders. As the court generally does when it reviews cases, the Court considered such materials in its initial and subsequent review of this case. The Court will grant this motion.

Petitioner's motion to alter or amend judgment does not advance any new or compelling arguments that would justify the relief requested. The Court will not amend its earlier ruling.

Accordingly, petitioner's motion to take judicial notice (doc. 37) is GRANTED, and petitioner's motion to alter or amend judgment (doc. 38) is DENIED.

IT IS SO ORDERED.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT COURT

Dated: Sept. 18, 1995.

IN THE UNITED STATES DISTRIC COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

(Filed Aug. 4, 1995)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0561-CV-W-8
	)	
MICHAEL GROOSE, et al.	)	
	)	
Respondents.	)	

ORDER

In this habeas corpus action brought under 28 U.S.C. sec. 2254, petitioner, Jon Keith Smith ("Smith") challenges the constitutionality of his conviction for first degree murder of Earl and Pauline chambers, armed criminal action, and first degree robbery, entered on May 22, 1987, in the Circuit Court of Jackson County, Missouri. The case is before the Court on a number of motions from Smith and his counsel, and on remand from the Eighth Circuit. These motions were apparently prompted by this Court's order dated March 22, 1995, in which the Court directed parties to propose a hearing schedule on the matter of petitioner's "newly discovered evidence."

Following a jury trial, Jon Keith Smith was convicted of two counts of murder in the first degree, two counts of armed criminal action, robbery in the first degree, and burglary in the second degree. Smith was sentenced to four consecutive life terms and one concurrent life term of imprisonment. After exhausting appeals available through the

state system, Smith filed a petition for writ of habeas corpus, in which he alleged fifteen grounds for relief. This first allegation, germane to this order, was that the prosecution failed to disclose the existence of a secret deal between co-defendant Anthony Lytle and the prosecution. In an order dated August 29, 1992, this Court denied Smith's petition for writ of habeas corpus. The Court's reason for denying relief on the ground of the purported secret deal was procedural default, based on Smith's failure to allege this ground on direct appeal. On February 1, 1993, the Eighth Circuit Court of Appeals remanded the case to the district court with directions to conduct further proceedings on the issue of "newly discovered evidence" including the alleged secret deal between co-defendant Lytle and the prosecutor. On March 2, 1993, this Court appointed counsel for Smith and directed the parties to confer and propose a hearing schedule on the matter of Smith's "newly discovered evidence."

This Court's review will be limited by the scope of the Eighth Circuit's remand order, which specifically directs this Court to "conduct further proceedings on the issue of newly discovered evidence." The instant case shares common factual issues with ***Bowman v. Armontrout***, case no. 90-0969-CV-W-P. James Edward Bowman and petitioner Smith were convicted for their participation in the same burglary and murders. Both challenged the constitutionality of their convictions based on a "secret deal" between codefendant Anthony Lytle and the prosecution. Both petitions for habeas corpus relief were denied by this Court, and both cases were subsequently remanded.

The Court revisited Bowman's petition on remand, and determined that a hearing on "newly discovered evidence" was neither necessary nor appropriate. ***Bowman v. Armontrout***, 859 F.Supp. 369 (W.D. Mo. 1994). Prior to trial, in a videotaped confession, Anthony Lytle implicated

Bowman. At trial, Lytle's testimony did not implicate Bowman. The jury chose to believe Lytle's pre-trial videotaped confession, and found Bowman guilty. On remand, this Court held that even if there had been a secret deal between Lytle and the prosecution, Bowman's constitutional rights were not therefore violated. Generally, the existence of a deal tends to undermine the credibility of a witness on a stand. The jurors apparently did not believe Lytle's testimony in court, so their awareness of a deal could not have caused them to disbelieve Lytle's in court testimony any more than they did. Likewise, the jury's decision to believe Anthony Lytle's videotaped confession implicating Smith would not be altered by the jury's awareness of any undisclosed deal between Lytle and the prosecution. The Court's exhaustive opinion in *Bowman v. Armontrout*, 859 F.Supp. 369 (W.D. Mo. 1994) is dispositive of the issues in the instant case.-

Accordingly, petitioner's request for habeas corpus relief is DENIED and all pending motions are DISMISSED AS MOOT.

IT IS SO ORDERED.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: Aug. 4, 1995.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3815WMKC

Jon Keith Smith,	*	
	*	
Appellant,	*	
	*	
vs.	*	Appeal from the United States
	*	District Court for the Western
Michael Groose,	*	District of Missouri
Missouri Attorney General,	*	
	*	
Appellees.	*	

JUDGMENT

Appellant's motion for appointment of counsel has been considered by the court and is granted. Ronald M. Baugh is appointed to represent appellant nunc pro tunc to January 9, 1993.

Appellant's motion to reconsider the judgment is construed by the court as a petition for rehearing and is hereby granted. The judgment of this court entered on December 31, 1992, is hereby vacated and the case is remanded to the district court with directions to conduct further proceedings on the issue of newly discovered evidence. This court strongly suggests that the district court appoint attorney Ronald M. Baugh to represent Jon Keith Smith in proceedings on remand. Mandate issued forthwith.

January 29, 1993

Order Entered at the Direction of the Court:

MICHAEL E. GANS

Clerk, United States Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3815WMKC

Jon Keith Smith,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the Western
vs.	*	District of Missouri
	*	
Michael Groose,	*	
Missouri Attorney General,	*	
	*	
Appellees.	*	

JUDGMENT

The court has carefully considered the original file of the United States District Court for the Western District of Missouri and it is hereby ordered that appellant's application for certificate of probable cause to appeal be denied.

December 31, 1992

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT IN A CIVIL CASE
(Filed Sept. 3, 1992)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Title	Docket Number
JON KEITH SMITH, PETITIONER,	91-0561-CV-W-8-P
vs.	Name of Judge or Magistrate
MICHAEL GROOSE, JR., RESPONDENT.	JOSEPH E. STEVENS, JR.

( ) JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

(X) DECISION OF THE COURT. This action came for consideration before the Court and the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

this petition for a writ of habeas corpus is denied; and this case is dismissed with prejudice. (JES) (dw).

Entered on Sept. 3, 1992

Clerk Date

ROBERT F. CONNOR)

(By) Deputy Clerk)

) Sept. 3, 1992

D.M. WEINZERL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

(Filed Nov. 25, 1992)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 91-0561-CV-W-8-P
	)	
MICHAEL GROOSE, et al.,	)	
	)	
Respondents.	)	

ORDER DENYING PETITIONER'S MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS AND FOR A CERTIFICATE OF PROBABLE CAUSE

By Order dated June 29, 1992, the Court denied Smith's petition for a writ of habeas corpus and dismissed his case with prejudice. Judgment was entered pursuant to that Order on September 3, 1992. Subsequently, the Court granted Smith until October 19, 1992, to file a notice of appeal and related motions. On that date, Smith filed a motion for leave to proceed on appeal *in forma pauperis* and for a certificate of probable cause. The Court will construe that document to constitute a notice of appeal.

Pursuant to 28 U.S.C. § 1915(a), "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith. Blackmun, ***In Forma Pauperis Appeals***, 43 F.R.D. 343 (1967).

Furthermore, pursuant to 28 U.S.C. § 2253, "[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding (unless the judge) issues a certificate of probable cause." A certificate of probable cause will be issued only when substantial questions of law deserving of appellate review are presented. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Clements v. Wainwright*, 648 F.2d 979 (5th Cir. 1981); *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979).

Because this case presents issues which are plainly frivolous and not deserving of appellate review, it is ORDERED that:

(1) petitioner's "[Motion] that the Court Modify the Rule Concerning the Number of Pages in the Motion Herein," filed October 19, 1992, is granted;

(2) petitioner's motion for leave to proceed on appeal *in forma pauperis* is denied; and

(3) petitioner's motion for a certificate of probable cause is denied.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Kansas City, Missouri,

Dated: 11/25/92

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

(Filed Aug. 29, 1992)

JON KEITH SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 91-0561-CV-W-8-P
	)	
MICHAEL GROOSE, et al.	)	
	)	
Respondents.	)	

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner brought this case under 28 U.S.C. § 2254 to challenge the constitutionality of his convictions for first degree murder, armed criminal action, and first degree robbery, entered on May 22, 1987, in the Circuit Court of Jackson County, Missouri.

Petitioner lists 15 grounds for relief: (1) he was denied due process of law because the prosecutor failed to disclose a deal he made with an accomplice; (2) he was denied the effective assistance of counsel because his attorney failed to conduct proper discovery and object to the State's improper discovery; (3) he was denied a fair trial because the prosecutor used peremptory challenges to exclude members of his minority race from the jury; (4) the trial court erred by refusing to suppress a pair of tennis shoes and certain fingerprint evidence; (5) the trial court erred by refusing to suppress a television set and a latent palm print; (6) he was denied the effective assistance of counsel because his attorney

failed to object to the admission of illegally seized evidence; (7) the trial court instructed the jury erroneously on accomplice liability; (8) the trial court applied Mo.Rev.Stat. § 491.074 (admissibility of prior inconsistent statement as substantive evidence) against him in an ex post facto manner; (9) the trial court erred by striking potential jurors for cause due to their views on sentencing after the prosecutor misstated the range of punishment during voir dire; (10) the trial court erred by dismissing, as untimely filed, his motion for post-conviction relief; (11) he was denied the effective assistance of counsel because his attorney failed to prepare adequately for trial; (12) he was placed in double jeopardy by the refiling of the indictment under which he was convicted; (13) he was denied the effective assistance of counsel because his attorney failed to object to the indictment under which he was convicted; (14) he was denied the effective assistance of counsel because his attorney failed to challenge testimony by the State's key witness; and (15) insufficient evidence was adduced at trial to support his convictions.

Fourth Amendment Claims--Grounds (4) and (5)

Petitioner complains that certain evidence used to convict him was obtained by unconstitutional means. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *Carlson v. State*, 945 F.2d 1036, 1028 (8th cir. 1991).

The record shows that petitioner received full and fair consideration of his Fourth Amendment claims. See Respondents' Exhibit E, pp. 8-15 (opinion of Missouri Court

of Appeals affirming convictions). Relief will be denied on grounds (4) and (5).

Proceedings on the Motion for Post-Conviction Relief--Ground (10)

Petitioner claims he was entitled to a hearing on his motion for post-conviction relief under Missouri Supreme Court Rule 29.15 because he "actually had been sentenced prior to the effective date of [that Rule] and . . . had no notice from the [trial court] of the specific time limitations." Petition, supp. p. 5. In *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990), the court held:

> Section 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding. Because there is no federal constitutional requirement that states provide a means of post-conviction review of state convictions, an infirmity in a state post-conviction proceeding does not raise a constitutional issue cognizable in a federal habeas petition.

(citations omitted). Following *Williams-Bey*, relief will be denied on ground (10).[1]

Procedurally Defaulted Grounds (1), (2), (6), and (11)-(14)

Petitioner defaulted ground (1) by not including it as a point on direct appeal. See Respondents' Exhibit C-1, pp.

---

[1]Additionally, petitioner's effective-date argument is meritless under the clear terms of Rule 29.15(m).

11-21 (petitioner's brief on direct appeal); *Daniels v. State*, 751 S.W.2d 399, 401 (Mo.App. 1988) (claim that prosecutor failed to disclose evidence must be raised on direct appeal). He defaulted grounds (2), (6), (11), (13), and (14) by not presenting them in a timely motion for post-conviction relief under Rule 29.15. See *State v. Pollard*, 735 S.W.2d 345, 347 (Mo. 1987) (motion for post-conviction relief is the correct method for presenting ineffective-assistance-of-counsel claims). Petitioner defaulted ground (12) by not raising it either on direct appeal or in a timely motion for post-conviction relief. See Respondents' Exhibit C-1, pp. 11-21 (petitioner's brief on direct appeal); *State v. Patterson*, 826 S.W.2d 863 (Mo.App. 1992) (double jeopardy claim considered on direct appeal); *Vinson v. State*, 807 S.W.2d 212 (Mo.App. 1991) (post-conviction relief granted under Rule 29.15 based on double jeopardy claim).

In *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2565 (1991), the Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

The Court further held that cause, prejudice, and the probability of a "fundamental miscarriage of justice" are to be judged under criteria set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Murray v. Carrier*, 477 U.S. 478 (1986). *Coleman*, 111 S.Ct. at 2563-65.

Petitioner has stated no cause for his failure to raise grounds (1) and (12) as points on direct appeal. See Petitioner's Traverse. As for the remaining defaulted grounds, he attributes his failure to file a timely Rule 29.15 motion to the ineffectiveness of post-conviction counsel. Id. at 4. As in *Coleman*, however, petitioner must "'bear the risk of attorney error'" regarding his motion for post-conviction relief because he was not constitutionally entitled to legal representation on that motion. 111 S.Ct. at 2567 (citation omitted).

Because petitioner also has failed to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Carrier*, 477 U.S. at 496, federal review is not required to prevent a fundamental miscarriage of justice. Relief will be denied on defaulted grounds (1), (2), (6), (11)-(14).

The Peremptory Removal of Potential Black Jurors--Ground (3)

Petitioner claims he was denied a fair trial because the prosecutor used peremptory challenges to exclude members of petitioner's minority race from the jury, a practice held to be unconstitutional in *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). Petitioner is black. The prosecutor peremptorily struck from the venire two of three black people. Respondents' Exhibit A-1, pp. 253-54 (transcript of argument on *Batson* motion). Defense counsel peremptorily struck the remaining black person. Id. at 254-55. Following defense counsel's timely *Batson* objection, the trial court asked the prosecutor to state the reasons for his strikes. Id. at 253-54.

The prosecutor offered four reasons for striking Emogene Lightner:

> [First], [s]he had heard publicity about the case before coming to court; two, that her granddaughter's house was burglarized and had been the victim of a recent burglary; third, that she had a relative who was presently in jail; and four, that she had some question about the burden of proof and whether or not the defendant should or should not testify.

Id. at 254. He added that "other jurors . . . didn't have all of those factors . . . ." Id.

The prosecutor offered two reasons for striking Joyce Myers, a potential alternate juror:

> [First], she stated that she was self-employed, and that she did not want to stay away from her business but would if made by the Court.
>
> . . . [Second], since she had the potential of having other things on her mind and she was not going to be one of the actual 12, I believe that would cause a problem in her paying attention to the evidence.

Id. at 255.

As in *Jones v. Jones*, 938 F.2d 838, 844 (8th Cir. 1991), defense counsel failed "to argue that the prosecutor's . . . explanations were merely a pretext for discrimination" (citing *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987). The trial court overruled the *Batson* objections, stating "that under these circumstances the reasons for the strikes make sense and they are reasonable and I find them to be racially neutral." Respondents' Exhibit A-1, p. 256. In affirming the trial court's judgment, the Missouri Court of Appeals stated:

"[T]he trial court properly considered the prosecutor's reasons for striking these venirepersons and determined that no discriminatory motives were involved. We believe the trial court's findings are within the directives of *Batson* and *Antwine*." Respondents' Exhibit E, p. 8.

The state courts' findings of fact regarding the exclusion of Emogene Lightner[2] and Joyce Myers from the jury are entitled to a presumption of correctness. *Jones*, 938 F.2d at 843 (citing 28 U.S.C. §2254(d)). Applying the statutory presumption, and because "none of the prosecutor's explanations implicated race," id., relief will be denied on ground (3).

Jury Instructions on Accomplice Liability--Ground (7)

Petitioner contends that Jury Instructions 6, 10, and 14 "incorrectly stated the law for accomplice liability as it relates to the offenses of felony murder and robbery in the first degree." Petition, supp. p. 4. He further contends that "the instructions were unsupported by the evidence and allowed the jury to speculate." Id. The Missouri Court of Appeals rejected both contentions, finding that the instructions were correct statements of Missouri law and that petitioner had not been prejudiced by them. Respondents' Exhibit E, pp. 15-19.

The applicable standard of review was set out in *Baker v. Leapley*, 965 F.2d 657, 659 (8th Cir. 1992):

---

[2]The prosecutor's second reason for striking Ms. Lightner was that her granddaughter had been the victim of a recent burglary. The Court notes that the same type of explanation was found to be racially neutral in ***State v. Jones***, 748 S.W.2d 896, 900 (Mo.App. 1988) ("prosecutor genuinely questioned [crime victim's] ability to hear the evidence impartially"), and ***Jones v. Jones***, 938 F.2d 838, 843 (8th Cir. 1991) (on habeas review of same case, court found that "none of the prosecutor's explanations implicated race").

> "[F]ederal habeas relief from a state conviction is not available because of improper jury instructions unless the error constitutes a fundamental defect that resulted in a complete miscarriage of justice or so infected the entire trial as to deprive the defendant of a fair trial." Moreover, "[a] state court's interpretation of state law is binding upon a federal court in a habeas proceeding."

(citations omitted). Having reviewed the record, and for the reasons stated by the Missouri Court of Appeals in its opinion, the Court finds that the challenged jury instructions did not deprive petitioner of a fair trial. Relief will be denied on ground (7).

Alleged Ex Post Facto Application of Mo.Rev.Stat. § 491.074– Ground (8)

Petitioner complains that the trial court applied Mo.Rev.Stat. § 491.074 in an ex post facto manner to "allow coconspirator Anthony Lytle's prior out of court statement to be used as substantive evidence." Petition, supp. p. 5. The statute in question, which took effect on July 19, 1985, provides: "Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in [a trial involving certain crimes] shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement."

As the Missouri Court of Appeals correctly pointed out, Mo.Rev.Stat. § 491.074 "does not constitute an ex post facto law because it merely changes a procedural evidentiary rule in criminal cases and in no way denounces criminal acts which were not criminal acts at the time they occurred or

changed the penalty involved." Respondents' Exhibit E, pp. 20-21; see *United States v. Day*, 949 F.2d 973, 981 n.7 (8th Cir. 1991) (law cannot violate Ex Post Facto Clause if it "merely changes 'modes of procedure which do not affect matters of substance'"). Relief will be denied on ground (8).

The Removal for Cause of Certain Veniremen--Ground (9)

Petitioner claims the trial court erred by striking potential jurors for cause due to their views on sentencing after the prosecutor misstated the range of punishment during voir dire. The Missouri Court of Appeals rejected petitioner's claim, finding: "[T]he prosecutor did not misstate the range of punishment and the trial court properly struck [the] venirepersons because they stated that they could not follow the punishment prescribed by law." Respondents' Exhibit E, p. 24. Because that interpretation of state law is binding upon this Court, *Baker*, 965 F.2d at 659, relief will be denied on ground (11).

Sufficiency of the Evidence--Ground (10)

Finally, petitioner claims that his convictions are not supported by sufficient evidence. A prisoner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). In determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the evidence must be reviewed in the light most favorable to the prosecution. Id. at 319 (emphasis in original).

The Missouri Court of Appeals summarized the evidence in support of petitioner's convictions. Respondents'

Exhibit E, pp. 21-23. That summary is supported by the record and need not be repeated here. Because a rational trier of fact could have found petitioner guilty of the crimes for which he was convicted, relief will be denied on ground (15).

For the reasons stated in this opinion, it is ORDERED that:

(1) this petition for a writ of habeas corpus is denied; and

(2) this case is dismissed with prejudice.

/s/ JOSEPH E. STEVENS, JR.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: 8/29/92

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

(Filed Mar. 20, 1990)

JON KEITH SMITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. WD42351
	)	ORDER FILED:
STATE OF MISSOURI,	)	March 20, 1990
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

The Honorable Timothy O'Leary, Judge

BEFORE: Ulrich, P.J., Shangler and Turnage, JJ.

PER CURIAM

ORDER

Appeal from denial of rule 29.15 motion for post-conviction relief.

Affirmed. Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JON KEITH SMITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. WD42351
	)	ORDER FILED:
STATE OF MISSOURI,	)	March 20, 1990

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

This is an appeal from the denial of appellant's Rule 29.15 motion for post-conviction relief. Appellant contends that the time limits imposed by Rule 29.15 are unconstitutional.

Appellant was convicted of two counts of first degree murder, two counts of armed criminal action, one count of

first degree robbery, and one count of second degree burglary. On May 22, 1987, the trial court impsoed life sentences on each count, with the exception of the burglary count, for which no sentence was imposed due to considerations of double jeopardy.

On July 22, 1988, appellant filed a *pro se* Rule 29.15 motion, alleging ineffective assistance of counsel, and that his rights to due process were violated because the state used perjured testimony to secure his conviction. His Rule 29.15 motion was later amended by counsel. On July 7, 12989, his motion was overruled by the motion court, which stated that it was without jurisdiction to hear his motion because it had been filed after the deadline provided by Rule 29.15(m).

As his first point on appeal, appellant claims that the June 30, 1988 filing deadline imposed by Rule 29.15(m) is unconstitutional. However, the time limits of Rule 29.15(m) are valid and mandatory, and have been upheld on constitutional grounds by the Missouri Supreme Court. *Day v. State*, 770 S.W.2d 692 (Mo. banc 1989).

Furthermore, in the wake of *Day v. State*, other cases have rejected the specific claims of unconstitutionality which have been raised by appellant. In *Smith v. State*, 776 S.W.2d 462 (Mo.App. 1989), the court rejected a movant's claim that the filing deadline in Rule 29.15(m) violated his rights to due process rights because he was not given notice of the deadline and because it makes no provision for an excusable failure to file on time. In *Kunkel v. State*, 775 S.W.2d 579, 580-581 (Mo.App. 1989), the court rejected a movant's claim that an identical provision in Rule 24.035 denied his rights to equal protection because he was not notified of the Rule's time limitations.

As his second point on appeal, appellant claims that his post-conviction counsel was ineffective in the drafting of his amended Rule 29.15 motion. However, because the late filing of appellant's motion bars its consideration, we do not reach this issue on the merits. *Belk v. State*, 772 S.W.2d 26, 27 (Mo.App. 1989).

Accordingly, the judgment of the motion court is affirmed.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	WD #39,501
	)	Order Filed: May 3, 1988
JON K. SMITH,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Timothy D. O'Leary, Judge

BEFORE GAITAN, P.J., TURNAGE AND CLARK, JJ.

PER CURIAM

ORDER

Appeal from conviction after jury trial of two counts of murder one, § 565.003, RSMo 1978, two counts of armed criminal action, § 571.015, RSMo 1986, one count of first degree robbery, § 569.020, RSMo 1986 and one count of burglary, § 569.170, RSMo 1986.

Judgment affirmed. Rule 30.25(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	WD #39,501
	)	Order Filed: May 3, 1988
JON K. SMITH,	)	
	)	
Appellant.	)	

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Defendant-appellant, Jon K. Smith, was tried and convicted by a jury on two counts of murder one, § 565.003, RSMo 1978, two counts of armed criminal action, § 571.015, RSMo 1986, one count of first degree robbery, § 569.020,

RSMo 1986 and one count of burglary, § 569.170, RSMo 1986. The jury assessed and the court sentenced the defendant to four life sentences but imposed no sentence on the burglary charge. Smith appeals his convictions. The judgment of the trial court is affirmed.

The sufficiency of the evidence to sustain appellant's conviction is in dispute. Viewed in the light most favorable to the verdict, the evidence adduced by the State was as follows: During the evening of November 26, 1983, James Bowman and Donald Dixon, otherwise known as "Bug", were driving around with Angela Dewberry and a girl named Tammy in Bowman's car when they stopped at another person's house to pick up appellant and Anthony Lytle. After driving the girls home at approximately 11:00 or 11:30, the group looked for a wedding reception. Later, they drove to appellant's house on 59th and Blue Hills Road where the group smoked marijuana. Dixon stated that they had to go do something -- meaning they had to steal -- and the group started walking north, knocking on doors and, if no one answered, they would unscrew the porch lights and burglarize the houses later.

Appellant stated he knew of a house where an elderly white couple lived who were almost never home. The group walked to the home of Earl and Pauline Chambers at 5801 Paseo. The group saw a fence and a "Beware of Dog sign." When Dixon knocked on the Chambers' front door, he noticed that the door was slightly open. Someone within the house pushed the door shut while he was there. Dixon asked whether there was a party. The person within the house stated no. As the group was leaving to walk back up the street, Lytle noticed a black man standing at the window. The group decided that the house was already being burglarized and that they would rob these burglars. Appellant and Bowman ran to get Bowman's car which contained a

shotgun in the trunk, and Dixon and Lytle hid in the trees. At one point, Dixon followed a man who left the house with a television set and realized he recognized him.

When appellant and Bowman returned with the car, Dixon stated that he knew the man who had exited the house and that they could go in the house. Lytle, who was acting as the lookout heard appellant holler "oh oh, a microwave", and saw appellant and Bowman leave with a television set and a microwave oven. Bowman returned five to six minutes later. While he was gone, Lytle heard another burglar telling elderly people in a bedroom that they had "so much stuff in the house that they should start their own store." After Bowman reentered the room, Lytle heard a scuffle, the words "No, no, no" and sounds of pain. Lytle ran back to investigate. Lytle saw Bowman kneeling over someone he thought was Earl Chambers lying in the doorway. Bowman was stabbing the person with a four to five-inch silver blade knife. The victim, actually Pauline Chambers, was already bleeding as Bowman stabbed her with downwards motions. Bowman placed the knife in his back pocket and began rummaging through drawers. Concerning the murder of Earl Chambers, Lytle stated that Bowman told him he "had to do it" because "the man would have got out and started hollering." Further, Lytle stated Bowman had blood on his jacket because blood had squirted everywhere.

The next morning, appellant brought a microwave from the side porch into his house and subsequently took the microwave from the house with Bowman and Dixon. Later, appellant brought a Zenith TV into the house. Also, when Bowman and Dixon arrived at Smith's house that morning, Bowman stated that there had been a homicide down the street "and they had to get the stuff out of the house."

Kansas City Police Officer James Hughes arrived at the Chambers' home at 10:25 on November 27. The front door was standing open, the deadbolt lock was damaged, and the glass from the upper pane of the storm door was broken. The rooms were in general disarray. He saw Pauline Chambers' body lying in the southeast bedroom doorway. Earl Chambers' body was lying with his head against the east wall. There was a considerable amount of blood and it appeared that some of the blood may have been walked in because there were shoe prints on the flooring. Crime scene investigators found a knife lying in the bed.

The autopsies revealed that Earl Chambers suffered from eight stab wounds in the chest, just below the rib cage, the arm, back and head, and 21 to 22 superficial cutting wounds in the back. He died from bleeding caused particularly by the stab wound which penetrated the heart and the stab wound which penetrated the abdomen. Pauline Chambers suffered a blow and stab wound, dying from multiple wounds, particularly a wound to the abdomen. Forensic tests showed that there was blood of Group O on the knife -- the blood type of both victims.

On November 28, the police recovered the Zenith television set from the upstairs bedroom in appellant's home. The police seized a pair of size 9 Nike tennis shoes from Lytle, a pair of boots from Bowman, and a pair of Adidas tennis shoes from Dixon. They also recovered a pair of Puma high-top tennis shoes from appellant. The police went to Bowman's residence where they found a 21-inch black and white Metalist television set under the front porch. They also recovered Earl Chambers' wallet at 56th and Highland.

Appellant's left palm print was found on the Zenith television set. The shoe print on the floor matched Dixon's shoes obtained by the police. Also, a remote control found

in the Chambers' home operated the Zenith television set, and pieces from a TV set found in the Chambers' driveway matched the television set.

Appellant presented no defense testimony. However, Lytle testified in court that when he entered the bedroom and saw the body lying on the floor, Michael Cunningham, one of the other burglars, stated "don't worry about it, we took care of him." At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty of two counts of first degree murder, two counts of armed criminal action, robbery in the first degree and burglary in the second degree. Appellant received two consecutive terms of life imprisonment for first degree murder, two concurrent terms of life imprisonment for armed criminal action and a concurrent term of life imprisonment for robbery. Because the court decided that a sentence for second degree burglary would violate appellant's rights against double jeopardy, the court imposed no sentence for second degree burglary.

I.

In his first point on appeal, appellant argues that the trial court erred in overruling his objection to the jury panel on the basis that the state used two of its six peremptory challenges to remove black persons from the jury. The state struck from the jury panel Venireperson No. 1, Emogene Lightner, and from the alternate panel, Venireperson No. 38, Joyce Myers. At trial and at the motion for new trial, the court took judicial notice that these venirepersons, as well as Venireperson No. 20, Edna Alexander, who was peremptorily struck by appellant, were black.

This issue is controlled by the United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and the recent decision

from the Missouri Supreme Court in *State v. Antwine*, 743 S.W.2d 52 (Mo. banc 1987).

The *Batson* court requires that once a defendant has established a *prima facie* case of discrimination, "[t]he burden shifts to the state to come forward with a neutral explanation for challenging black jurors." *Batson v. Kentucky*, *supra*, 106 S.Ct. at 1723. See also *State v. Antwine*, *supra*, 743 S.W.2d at 64.

In the present case, the prosecutor stated that he struck Emogene Lightner because she had heard publicity about the case before coming to court, her granddaughter had been the victim of a recent burglary, she had a relative who was presently in jail, and she had some question about the burden of proof and whether or not the defendant should or should not testify. The prosecutor noted that there were other jurors who did not have the combination of all of these factors and that he left another black, Venireperson No. 20, on the jury although appellant used his peremptory strike to strike the venireperson.

The prosecutor stated that he struck Venireperson No. 38, Joyce Myers, an alternate, because she stated that she was self-employed and did not want to stay away from her business but would if made to do so by the court. The prosecutor noted that as an alternate, she would still have to sit through the case, and he was concerned that she would have other things on her mind because she would know that it would be unlikely that she would become one of the twelve jurors.

Looking to what he alleges are similarly situated white venirepersons, appellant argues that the prosecutor's reasons were actually a pretext for racial discrimination. As noted by

the Missouri Court of Appeals, Eastern District, in *State v. Jones*, No. 51839 (Mo.App , E.D. January 19, 1988):

> Our Supreme Court expressed its approval of the 'similarly situated' concept adopted by the Western District in *State v. Butler*, [*supra*] but did not hold that evidence of the state's failure to strike a similarly situated white veniremen mandated reversal. *State v. Antwine*, slip op. at 27. Rather, the *Antwine* court stated that evidence of similarly situated whites remaining on the panel should be considered by the trial court in making its final determination.

See also *State v. Taylor*, No. 51235 (Mo.App., Feb. 9, 1988). However, the court stated "we do not, therefore, adopt the holding of *Butler* that only objectively supportable explanations for its use of peremptory challenges survive a '*Batson* challenge.'" *State v. Antwine*, *supra*, 743 S.W.2d at 65. Consequently, even if a finding were made that similarly situated white venire members were left on the jury, it would not necessarily entitle the appellant to relief. Again, it must be stressed that in *Antwine*, the court emphasized the trial court's discretion in considering these factors and the appellate court's limited standard of review in that, if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the court may not reverse it even though it is convinced that, if it had been sitting as the trier of fact, it would have weighted the evidence differently. *State v. Antwine*, 743 S.W.2d at 66.

In sum, the record shows that the trial court properly considered the prosecutor's reasons for striking these venirepersons and determined that no discriminatory motives

were involved. We believe the trial court's findings are within the directives of *Batson* and *Antwine*.

II.

In his second point on appeal, appellant argues that the trial court erred in overruling his motion to suppress and in admitting appellant's tennis shoes and fingerprints because the evidence was obtained in violation of Chapter 211 of the juvenile code.

The facts relevant to this issue are as follows: On November 28, 1983, police detectives developed information from a Ronald Johnson that stolen property from the Chambers, including a television and probably a microwave oven, were in the residence located at 5978 Blue Hills. At approximately 4:00 o'clock that day, Johnson entered the residence and confirmed for the police that the property was there. Based on this information, the police obtained a search warrant. On the basis of a capias warrant obtained from Juvenile Court, appellant was arrested approximately one hour later. At the time of his arrest, appellant gave the police a different name and the police took the property from appellant's person at that time.

Prior to trial, the state made a motion to take appellant's fingerprints and in support of such motion, Richard Schwieterman testified that appellant's fingerprints had been taken by Officer Pelter on November 29, 1983. Pelter was no longer in the department and Schwieterman could not say whether the prints belonged to appellant. Based on this showing, the court ordered that appellant be fingerprinted and appellant's finger and left palm prints were taken on March 12, 1987. At trial, Schwieterman testified that a print found on the TV recovered from appellant's residence matched appellant's palm print.

Appellant argues that the evidence concerning the tennis shoes and fingerprints should have been suppressed because appellant's arrest was in violation of § 211.061, RSMo 1986 of the Juvenile Code which provides.

> When a child is taken into custody with or without warrant for an offense, the child, together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him.

Under the code, a "child" is a person "under seventeen years of age." See § 211.021(2), RSMo 1986. The trial court did not admit appellant's fingerprint taken at the time of the arrest but instead, admitted the fingerprint taken immediately prior to trial.

In support of his argument, appellant relies on *State v. Wade*, 531 S.W.2d 726, 728-29 (Mo. banc 1976), in which the court ruled that a statement taken by a juvenile to the police when he had misrepresented his age, was not admissible despite his misrepresentation.

Wade applies to confession. Here the police took appellant's clothes and fingerprints rather than taking him to the juvenile authorities because he misrepresented his name. Upon discovery of his proper name, he was taken to the juvenile authorities. The Missouri Supreme Court in *State v. Moore*, 580 S.W.2d 747, 750 (Mo. banc 1979), held that *Wade* did not bar the use by the state of a defendant's shoe and identification testimony linking him to a crime which was taken by the police when he was a juvenile. In addition, as the trial court in the present case noted, the tennis shoes and

fingerprints would have been inevitably discovered through lawful means. *State v. Butler*, 676 S.W.2d 809, 813 (Mo. banc 1984). Edna King, a juvenile detention center supervisor, testified that the juvenile clothes are in fact inventoried. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *State v. Lingar*, 726 S.W.2d 728, 737 (Mo. banc 1987), *cert. denied*, 108 S.Ct. 206 (1987).

The trial court properly admitted the evidence.

III.

In his third point on appeal, appellant alleges that the trial court erred in overruling his motion to suppress and admitting into evidence the television seized from appellant's residence, a palm print lifted from that television set, and testimony relating to the seizure because appellant alleges that Ronald Johnson conducted an illegal search of the residence as a state agent.

The evidence relevant to this issue is as follows: In connection with the homicide investigation, Kansas City Detective Earl Craven met with Ronald Johnson in the area of 55th and Olive because Johnson had contacted a Sergeant Dodson indicating that he had some information concerning the homicide. Johnson told the detective that he had been to a house on Blue Hills Road and several persons returned with property from the Chambers residence. They also told him that they had burglarized the Chambers' residence and had to fight the residents to get away. Craven had never spoken to Johnson before and did not know whether another detective had.

Craven asked Johnson to accompany him to appellant's residence at 5978 Blue Hills Road to go back in the house to determine whether the property, a television set, was still in the residence. The detective instructed Johnson to determine what part of the residence the television was in and come back and tell them. The detective was parked directly across the street from appellant's apartment complex parking lot so that he could watch Johnson enter the house. Approximately fifteen minutes after he entered the house, Johnson came to the police vehicles and stated that the television set was still in the house.

Based upon that information, Craven executed an affidavit for a search warrant indicating that a crime scene investigation had shown that a black cable which indicated a cable television reception and an empty portable television stand had been found in the residence. Detectives had also found a Zenith remote control channel changer lying on the living room floor, a purchase order for a Zenith television set, and an empty microwave oven stand. The affidavit stated that an anonymous telephoner had stated that prowlers were carrying out TV's from the residence.

It is uncontested that Johnson was acting as an agent for the state when he reentered the residence because the police had directed him to reenter the house. *State v. Collett*, 542 S.W.2d 783, 787 (Mo. banc 1976); *State v. Rife*, 619 S.W.2d 900, 902 (Mo.App. 1981). However, Johnson's initial entry to the house was not a search. The real issue appears to be whether or not as a state agent, the information Johnson obtained from his initial entry could have supplied probable cause for the search warrant.

Clearly, Johnson's information could be used because saw the television set in plain view. The "plain view" doctrine constitutes an exception to the warrant requirement when (1) the evidence is observed in plain view while the officer is in a place where he has a right to be; (2) the discovery of the evidence is inadvertent; and (3) it is apparent to the police that they have evidence before them. *State v. Schneider*, 736 S.W.2d 392, 399 (Mo. banc 1987). Under this first requirement, Johnson was lawfully in the residence because he entered the residence and even spoke to appellant while he was there. It is no defense that appellant was unaware that Johnson was working as an agent for the state because this case is similar to cases which find that an undercover police officer's entry by consent, though obtained by deception, is not prohibited by the Fourth Amendment. See *Lewis v.*

United States, 385 U.S. 206, 210-12, 87 S.Ct. 424, 427-28, 17 L.Ed.2d 312 (1966); *United States v. Shigmura*, 682 F.2d 699, 706 (8th cir. 1982). Thus, because Johnson, acting as an undercover police agent, entered lawfully, items that he saw in plain view could be seized, *United States v. Shigmura*, *supra*, 682 F.2d at 706, or in this case, the information supplied from that viewing could be used to support a search warrant.

Appellant next argues that the officer's subsequent search of appellant's house and seizure of the television set was unreasonable because the warrant to search appellant's residence was not based upon an adequate showing of probable cause. According to appellant, the application for the warrant was based upon information obtained from Ronald Johnson, an informant whose reliability had not been determined.

In *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed. 527 (1983), the court abandoned the two-prong test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 273 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and adopted a "totality of circumstances" test to be used to determine whether a search warrant is supported by probable cause. In the present case, the affidavit indicated that Ronald Johnson, a private citizen, witnessed appellant and his co-defendants return with the items. The police verified the reliability of his information by sending him back to the residence to see whether or not the items were still there. This enabled Officer Craven to swear in his application and affidavit that the property was, in fact, there. Under these circumstances, the judge could have found that the information supplied probable cause to support a search warrant. In addition, the search warrant indicated that the police had been to the victims' residence and noted that a

television was missing. Also, the police stayed outside the residence while Johnson entered it so that they could verify the information. Accordingly, the search warrant was supported by other factors and was valid. See also, *Commonwealth v. Bowden*, 399 N.E.2d 482 (Mass. 1980); *State v. Daley*, 189 Conn. 717, 458 A.2d 1147, 1150 (1983); Lafave Search and Seizure, Section 3.3. *United States v. Louis*, 738 F.2d 916, 921-22 (8th Cir. 1984).

In his final attack on the search of the residence, appellant argues that the detective did not execute a proper return of the search warrant in compliance with § 542.276.9, RSMo 1986. He argues that Detective Craven signed the return to the search warrant although he did not make the search and that the return does not accurately show the manner of execution.

While Craven did not personally execute the search, he indicated that a number of officers searched the residence and that he supervised the search. Craven became the property man, and inventoried the items that were found. Although apparently no one was at home when the search began, Lillian Breckenridge, appellant's mother, arrived while the officers were at the residence and was served with the search warrant.

Further, it is well established in Missouri, that the return to a search warrant is a ministerial act and that even the total failure to file a return does not affect the validity of the search warrant itself. See *State v. Macke*, 594 S.W.2d 300, 309 (Mo.App. 1980); *State v. Hunt*, 454 S.W.2d 555, 559 (Mo. 1970), *cert. denied*, 400 U.S. 942 (1970). Under these circumstances, the trial court properly admitted the evidence.

IV.

Appellant next raises a variety of issues concerning the verdict directors: Instructions 6, 10 and 14. Appellant alleges that the trial court erred in submitting Instructions 6, 10 and 14 in the disjunctive and the trial court erred in submitting Richard Cunningham and Rodney Cayson's name where there was no proof that appellant had the purpose of committing the offenses with them and where Cayson's name was not mentioned in evidence. Appellant also argues that the trial court erred in submitting the verdict directors on armed criminal action because they related to the substantive offenses of felony murder and first degree robbery.

First, appellant argues that the trial court erred in submitting Instructions 6 and 10 on felony murder in the disjunctive because the evidence showed that the group jointly committed the burglary but that James Bowman committed the actual murders of Pauline and Earl Chambers. The trial court properly submitted the verdict directors under this alternative because the evidence was unclear or conflicted as to who committed the elements of the offense. According to MAI-CR2d 2.10, Notes on use 6(c):

> [W]here the evidence is not clear or conflicts as to which person (in a group including the defendant) engaged in the conduct constituting the offense (as where the defendant is charged with burglary and the evidence shows the defendant was one of two persons, one of whom unlawfully entered the building and stole while the other remained outside as a lookout, describe the elements of the offense to the defendant or the other person or persons.

> Use. the alternative 'acted together with or aided' and the paragraph following "then you are instructed that the offense of [name of offense] has occurred. . . .

The jury may have rejected Lytle's testimony and believed that Lytle, Dixon or appellant actually stabbed the victim. While appellant is correct in noting that the notes on use to MAI-CR2d 2.12 provide that the instruction should not be given in a felony murder prosecution, the Missouri Supreme Court in *State v. Rummel*, 680 S.W.2d 939, 943 (Mo. banc 1984), found a modified MAI-CR2d 2.12 instruction for felony murder was not prejudicial error where it contained a correct statement of the law. In the present case, the verdict directors for felony murder contained correct statements of the law.

The jury was then instructed that, if it found beyond a reasonable doubt that during the time that appellant, Lytle, Dixon and Bowman were in the residence with the purpose of promoting or furthering the burglary, appellant acted together with or aided Lytle, Dixon or Bowman in committing the burglary, only then, could the jury find appellant guilty of first degree murder. Accordingly, if the jury found that Cunningham or Cayson stabbed the victims, the jury would have to find appellant not guilty because the jury was merely instructed that appellant must be found to have acted together with or aided Lytle, Dixon or Bowman in committing that offense in order to find appellant guilty. This verdict director was consistent with appellant's defense that either Cunningham or Cayson committed the murders and that he was therefore not guilty.

Appellant also argues that the second paragraph deviated from MAI-CR2d 15.06. However, the deviation merely allowed for accomplice liability. Thus, the verdict

directors for first degree murder were correct statements of the law and the trial court committed no error in submitting them.

Appellant also argues that Instruction 14 on first degree robbery again improperly submitted the elements of the offense in the disjunctive and outlined different groups of alleged co-participants in successive paragraphs. As with the first degree murder instructions, the instructions properly provided the elements of the robbery in the disjunctive because, based on Lytle's testimony, the evidence was unclear or conflicted as to who committed what elements. Certainly, the evidence was unclear or conflicted as to which person used physical force on Earl Chambers and which person threatened the immediate use of a dangerous instrument against him. Moreover, the evidence was unclear or conflicted as to who carried what television sets. Therefore the trial court properly submitted these elements in the disjunctive. In order for the appellant to be guilty of this offense, each element must have been committed after the time the appellant joined the group of burglars. The jury was so instructed and there was evidence to support their finding. It also should be noted that the jury received converse instructions.

Finally, appellant argues that the instructions are not supported by the evidence because the instructions refer to Rodney Cayson who was not mentioned at trial. Appellant failed to object to this error at trial. However, we shall consider it *ex gratia*.

According to Supreme Court rule 28.01(e):

> [G]iving or failing to five an instruction or verdict form in violation of this Rule or any applicable Notes on use shall constitute error, its prejudicial effect to be judicially determined.

Erroneous instructions are found to be prejudicial only where the trial court has so misdirected or failed to instruct the jury on the law of the case as to cause a manifest injustice. *State v. Wakefield*, 712 S.W.2d 442, 444 (Mo.App. 1986). See also *State v. McCain*, 731 S.W.2d 305, 306 (Mo.App. 1987).

In the present case, the evidence clearly showed that other burglars were involved. During his testimony, Lytle referred to Richard Cunningham as one of the other burglars. The jury realized that six persons were involved in the burglary and would infer that Ronald Cayson was the sixth burglar. The reference to Cayson in the jury instruction was mere surplusage. The appellant was not prejudiced because the jury understood that if it believed that Cunningham or Cayson had committed the murder, appellant could not be found guilty. See *State v. Ramsey*, 477 S.W.2d 88, 90 (Mo. 1972). Consequently, appellant's argument is without merit.

V.

In his fifth point on appeal, appellant contends that the application of § 491.074, RSMo 1986 to appellant's offense of first degree felony murder pursuant to § 565.003, RSMo 1978, violated the prohibition against ex post facto laws of Article I, § 10 of the United States Constitution and Article I, § 13 of the Missouri Constitution.

At trial, the state impeached Anthony Lytle with his prior confession as authorized by § 491.074, RSMo 1986, effective July 19, 1985 which reads as follows:

> Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of an offense under Chapter 565, 566, or 568, RSMo, shall be received as substantive evidence, and the

party offering the prior inconsistent statement may argue the truth of the statement.

See § 491.074, RSMo 1986. The Missouri Supreme Court has upheld the constitutionality of the statute and further has held that a foundation for impeachment is not required under the statute. See *State v. Bowman*, 741 S.W.2d 10, 12-14 (Mo. banc 1987).

Because § 491.074 is a procedural statute, it does not violate the provisions against ex post facto laws. Under Missouri law, an ex post facto law is one which "denounces as criminal acts which were non-criminal when committed or . . . changes penalties or criminal violations after such violations are committed." *State v. Pizzella*, 723 S.W.2d 384, 387-88 (Mo. banc 1987) (§ 545.880.1, providing for joinder in criminal cases in a procedural law), quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. banc 1982), appeal dismissed, 459 U.S. 1094 (1983); *State v. White*, 622 S.W.2d 939, 947 (Mo. banc 1981), *cert. denied*, 456 U.S. 963 (1982) (reenactment of § 545.180 reducing the number of peremptory strikes was a procedural law); *State v. Maynard*, 714 S.W.2d 552, 554 (Mo.App. 1986) (speedy trial statute constituted procedural law); *State v. Henderson*, 701 S.W.2d 457, 458 (Mo.App. 1985) (statute permitting an appeal by the state did not constitute ex post facto law). Consequently, § 491.074, RSMo 1986, does not constitute an ex post facto law because it merely changes a procedural evidentiary rule in criminal cases and in no way denounces criminal acts which were not criminal acts at the time they occurred or changed the penalty involved.

The trial court properly permitted the impeachment of Anthony Lytle pursuant to § 491.074.

VI.

Appellant next asserts that the trial court erred in overruling his motion for judgment of acquittal concerning first degree robbery, felony murder and armed criminal action. Appellant argues that Lytle's prior inconsistent statement could not be used as substantive evidence to establish these offenses and, without the statement, there was insufficient evidence to support appellant's guilt. However, our prior discussion on this point precludes a need for further decision except as follows.

FIRST DEGREE ROBBERY

In reviewing the sufficiency of the evidence, this Court shall consider the evidence in the light most favorable to the state, and disregard all contrary evidence and inferences. *State v. Wynn*, 729 S.W.2d 585, 587 (Mo.App. 1987).

The evidence, aside from the prior inconsistent statement, was indeed sufficient to prove appellant's guilt of this robbery. The evidence showed that the appellant and his friends went door to door looking to steal, that they came upon the victims' home, that they realized a burglary was in progress, and joined that burglary. Further, the evidence was that they either observed force being applied to the victims, or participated in killing the victims.

Accordingly, the jury was provided sufficient evidence that appellant was guilty of first degree robbery. Based on the evidence presented, the jury could find that appellant's group joined the other group of robbers or burglars prior to the time of the robbery. Because Cunningham told Lytle that they had taken care of the victims after the time that appellant and Bowman left the house, it was reasonable to infer that the

robbery occurred while appellant and Bowman were in the house and that appellant was an accomplice to that robbery. Also, it can be inferred that any one of the participants used force against Earl Chambers after the time that appellant's group joined the complicity but before appellant left the house. Moreover, the statement of Cunningham that "we took care of it" could have been attributed to anyone of the actors. Viewing the evidence int he light most favorable to the state, the jury was presented with sufficient evidence of first degree robbery.

FIRST DEGREE MURDER AND ARMED CRIMINAL ACTION

Appellant also argues that there was insufficient evidence of felony murder in the first degree because, absent the substantive use of Lytle's out-of-court statement, there was no evidence that Pauline and Earl Chambers were killed in the perpetration of a burglary. However, as found in *State v. Bowman*, 741 S.W.2d 10, 12-14 (Mo. banc 1987), prior inconsistent statements can in fact be used to support the evidence concerning appellant's guilt. § 491.074, RSMo 1986. Therefore, the jury was provided with sufficient evidence of appellant's guilt. After the jury determined that appellant was guilty of first degree murder, it had to determine whether appellant, Lytle, Dixon or Bowman were in the residence when appellant, Lytle, Dixon, Bowman, Cunningham or Cayson committed the murder by, with or through the use, assistance or aid of a dangerous instrument. The state proved that element because a knife was found on the bed containing the victim's blood type, and the victims were obviously stabbed.

VII.

In his final point on appeal, appellant claims that the trial court committed plain error in striking for cause Venirepersons Paula Setzer, Helen Davis, Kathy Trabue and Martha Carter who stated that they could not follow the law relative to punishment. According to appellant, the prosecutor misstated the minimum range of punishment, leading the jury to believe that the sentences must run consecutively. As appellant concedes, he failed to object to the challenges during voir dire and failed to raise the issue in the motion for new trial, therefore the issue can only be considered for plain error pursuant to Supreme Court Rule 30.02.

The trial court's ruling on selecting and impaneling a jury will only be overturned based upon a showing of a clear and certain abuse of discretion and a real probability of injury to the defendant. *State v. Pruitt*, 714 S.W.2d 544, 550 (Mo.App. 1986); *citing*, *State v. Draper*, 675 S.W.2d 863 (Mo. 1984). In this regard, the prosecutor may demand that a potential juror be willing to consider all of the penalties provided for by state law. *State v. Dougherty*, 631 S.W.2d 637, 644 (Mo. 1982); *State v. Webb*, 725 S.W.2d 901, 903 (Mo.App. 1987). In the present case, the prosecutor did not misstate the range of punishment and the trial court properly struck these venirepersons because they stated that they could not follow the punishment prescribed by law.

Regardless of whether the judge imposed the sentences consecutively or concurrently, the jury would still have the duty to impose at least the minimum sentence for each count and the prosecutor was correctly questioning whether or not the venirepersons could do that. We see no manifest injustice here. Therefore, the appellant's failure to object preserves nothing for review.

The judgment of the trial court is affirmed.

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No. 00-354

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. GAMMON,
Superintendent,
Moberly Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

JON KEITH SMITH,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Despite Respondent's claims to the contrary the decision of the Court below directly conflicts with the fifth Circuit precedents in ***Jacobs v. Scott***, 31 F.3d 1319 (5th Cir. 1994) and ***Nichols v. Scott***, 69 F.3d 1255 (5th Cir. (1995). Also contrary to Respondent's claims the decision of the court below is contrary to and in conflict with this Court's ***Teague v. Lane*** jurisprudence.

The Attempt to Distinguish *Jacobs v. Scott*

Respondent argues that there is no conflict with ***Jacobs v. Scott***, because the claim in ***Jacobs*** that the prosecutor used contradictory theories in the trial of accomplices and therefore violated due process was decided on procedural bar grounds, as opposed to ***Teague*** (Brief in Opposition at 10-11). This is simply wrong. The Fifth Circuit explicitly relied on ***Teague v. Lane*** as the reason for rejecting this claim. ***Jacobs v. Scott***, 31 F.3d at 1326.

Respondent apparently concludes that the claim was decided based on procedural bar because the opinion discussed newly discovered evidence at page 1325 (Brief in Opposition at 11). But, a careful reading of ***Jacobs*** reveals that this discussion was in the context of a separate free standing claim of actual innocence of the crime and innocence of the death penalty. ***Jacobs v. Scott***, 31 F.3d at 1324-1325. The due process contradictory evidence claim was decided on the threshold issue of ***Teague v. Lane***, 489 U.S. 288 (1989), and the decision is in direct conflict with the decision of the court below in this case.

Respondent also argues that ***Jacobs*** is factually distinguishable because the theories presented in the trials of Jacobs and his accomplice were not "directly contradictory and diametrically opposed" and did not go to the "core of the prosecutor's case" (Brief in Opposition at 11). Again, Respondent is wrong. Jacobs was convicted and sentenced to death based on the theory that he was the triggerman, but at the trial of Hogan, the state argued that Jacobs not only did not know Hogan, had a gun but that Jacobs did not in any way anticipate the victim would be shot. ***Jacobs v. Scott***, 31 F.3d at 1322-1323. Jacobs would necessarily be innocent of capital murder, the crime of which he was convicted under the theory presented at the trial of Hogan. *Id.* at 1324.

The Attempt to Distinguish *Nichols v. Scott*

Respondent asserts that ***Nichols v. Scott***, 69 F.3d 1255 (5th Cir. 1995) is distinguishable from the decision of the court below because ***Nichols*** "was not a due process decision but rested on principles of estoppel, both collateral and judicial" (Brief in Opposition at 11-12) (emphasis added). Respondent is wrong. The section discussing the contradictory prosecutorial theories claim in ***Nichols v. Scott***, is titled "Estoppel-Due Process." *Id.* at 1268. The Fifth Circuit pointed out that in granting relief the district court found the following, "the due process boundary upon prosecutorial conduct and the appearance of basic fairness derived from that boundary command[s] a determination that in a criminal prosecution, the state is *constitutionally estopped* from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial." *Id.* The Fifth Circuit however rejected the proposition that "generic due process" could support such a decision absent a double jeopardy violation which is the constitutional basis of collateral estoppel. *Id.* at 1269. The Fifth Circuit also rejected the district court's conclusion that due process was violated based on constitutionally mandated judicial estoppel, pointing out that judicial estoppel is not constitutionally mandated and that the doctrine has apparently never been applied against the government in a criminal case. *Id.* at 1272.

Read in context, the Fifth Circuit's application of the principles of ***Teague v. Lane*** to deny relief in ***Nichols*** is clearly an application of ***Teague*** to the due process clause. The Fifth Circuit in fact explicitly rejected the argument that a ***Teague*** bar could be avoided by relying on judicial pronouncements that due process concerns itself with fundamental fairness. *Id.* at 1274. The court below in direct conflict with ***Nichols*** essentially relied on broad judicial

pronouncements about fairness in finding the rule of law it applied was not new (App. at 16).

Of course ***Nichols v. Scott*** was a due process case. If the due process clause was not at the root of the decision, the federal courts would have had no jurisdiction to review the case under 28 U.S.C. §2254(a). ***Nichols v. Scott*** directly conflicts the decision of the court below.

Respondent also argues that ***Nichols v. Scott*** is distinguishable from the opinion of the court below because "the inconsistent theories presented in *Nichols* case were not factually inconsistent and had no effect on the liability of either accomplice" (Brief in Opposition at 12). The theories presented by the prosecutor at the trials of the accomplices in the ***Nichols*** case were factually inconsistent as the following excerpt from closing arguments quoted in the district court opinion demonstrates.

Williams Trial

> "Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence."
>
> "[T]here is only one bullet that could possibly have done it and that was Willie Williams."

Nichols Trial

> "Willie could not have shot him."
>
> "And I submit to you from the evidence, [Nichols] fired the fatal bullet and killed the man in cold blood and he should

answer for that."

At the punishment phase:

> "Is it fair and equal for Willie Williams to sit up there on death row when this man planned the whole ting and fired the shot."

Nichols v. Collins, 802 F.Supp. 66, 73 (S.D. Tex 1992).

In short, the prosecutor argued at Williams' penalty phase that Williams fired the fatal shot and only Williams possibly could have fired it. He then argued at Nichols' trial that Nichols fired the fatal shot and that Williams could not have done it. Then, he argued Nichols should be sentenced to death based on fairness and equality because Williams had been sentenced to death but Nichols fired the fatal shot.

The court below rejected the affirmative defense of ***Teague*** bar based on the general principle that the due process clause dictates that prosecutors must be fair and presenting contradictory theories at the trials of accomplices is unfair (App. at 16). The prosecutor's conduct in ***Nichols*** cannot be objectively viewed as more fair to Nichols than the prosecutor's conduct was to Respondent. In fact that conduct must objectively be viewed as less fair, and yet the ***Teague v. Lane*** bars was properly upheld in ***Nichols***. ***Nichols v. Scott*** is in conflict with the decision of the court below.

The Misinterpretation of this Court's *Teague v. Lane* Jurisprudence

Despite Respondent's argument to the contrary the opinion of the court below explicitly misinterprets and misapplies this Court's ***Teague v. Lane*** jurisprudence. In

Saffle v. Parks, 494 U.S. 484, 486 (1990), this Court stated the following in finding a rule of law to be new. "It is not dictated by our prior cases and were it to be adopted it would contravene well considered precedents."[1] The court below cited this statement for the proposition that, "[u]nder ***Teague***, a new rule is one that is not dictated by precedent and if adopted would contravene well established precedents" (App. at 16).

What the court below has explicitly done is create a two part conjunctive test to determine if a rule of law is new. Under this test a rule is new only if it is not dictated by existing precedents and if it would contravene well established precedents. The second prong of this test has no foundation in the jurisprudence of this Court including the ***Saffle*** decision. ***See Saffle v. Parks***, 494 U.S. at 488 (stating, "In ***Teague***, we defined a new rule as a rule that breaks new ground imposes a new obligation on the states or federal government or was not dictated by precedent existing at the time the defendant's conviction became final"). The definition of a new rule adopted by the court below excludes from the definition of new rules, rules which are not dictated by existing precedent, but which do not contravene well established precedent. This conjunctive definition turns this Court's ***Teague*** jurisprudence on its head. This definition which significantly narrows the definition of a "new rule" necessarily creates the potential for future conflicts between the court below and other circuit courts of appeals.

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[1]Petitioners mistakenly indicated in the petition that this statement is in the syllabus of ***Saffle***. It is actually on the first full page of the opinion.

CONCLUSION

WHEREFORE, Petitioners pray that this Court grant the pending petition for the writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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